Supreme Court, U.S.
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No. 04-1102

In The

Supreme Court of the United States

GUILLERMO BERRIOCHOA LOPEZ, et al.,

Petitioners,

vs.

WILLIAM J. CLINTON, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where a U.S. citizen, who is also a Mexican national, is denied consideration by federal actors of his application for a trucking services operating permit solely on the basis of his Mexican national origin, did the respondents' conduct constitute discrimination based on national origin under Bivens, over which the Court has subject matter jurisdiction?

2. Where a U.S. citizen, who is also a Mexican national, is denied consideration by federal actors of his application for a trucking services operating permit solely on the basis of his Mexican national origin, did the respondents' conduct constitute discrimination based on national origin under the Federal Tort Claims Act?

3. Where a U.S. citizen, who is also a Mexican national, is denied consideration by federal actors of his application for a trucking services operating permit solely on the basis of his Mexican national origin, did the respondents' conduct constitute discrimination based on national origin under the Alien Tort Claims Act?

4. Where Mexican nationals who are otherwise entitled to trucking services operating permits under NAFTA are denied consideration of their applications solely on the basis of their Mexican national origin, did the respondents' conduct constitute discrimination based on national origin under Bivens, over which the Court has subject matter jurisdiction?

QUESTION PRESENTED – Continued

5. Where Mexican nationals who are otherwise entitled to trucking services operating permits under NAFTA are denied consideration of their applications solely on the basis of their Mexican national origin, did the respondents' conduct constitute discrimination based on national origin under the Federal Tort Claims Act?

6. Where Mexican nationals who are otherwise entitled to trucking services operating permits under NAFTA are denied consideration of their applications solely on the basis of their Mexican national origin, did the respondents' conduct constitute discrimination based on national origin under the Alien Tort Claims Act?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were Plaintiffs Guillermo Berriochoa Lopez; Transportes Intermex, S.A. DE C.V.; S'Antonio Transportes, S.A. DE C.V.; Jose Silvino Magana Lopez; Jose Alfredo Magana Lopez; Miguel Angel DeLa Rosa Sanchez; Servicio Tecnico Automotriz Perisur, SA. DE C.V.; Tomas De La Rosa Parra; Ernesto Vallet Haces; Max E. Barton; Carlos Berriochoa as Petitioners herein and Defendants William J. Clinton; Federico F. Pena; Rodney E. Slater; Kenneth R. Wykle; Ricardo Martinez, MD; United States of America; Department of Transportation, United States; Federal Highway Administration; National Highway Traffic Safety Administration; Federal Motor Carrier Safety Administration.

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OPINIONS AND ORDERS BELOW

The Order of the United States Court of Appeals for the D.C. Circuit's Opinion Granting the Appellees' Motion for Summary Affirmance was filed November 17, 2004, reprinted in Appendix hereto App. 1. The Order of the United States District Court for the D.C. Circuit's Opinion Granting Defendants' Motion to Dismiss was signed by Judge Emmet G. Sullivan and filed March 23, 2004, reprinted in Appendix hereto App. 17. The Memorandum and Opinion of the United States District Court for the D.C. Circuit was signed by Judge Emmet G. Sullivan and filed March 23, 2004, reprinted in Appendix hereto App. 3.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1331, Federal question jurisdiction, and under 28 U.S.C. §1254(1), and Supreme Court Rule 13.1.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case are the Federal Tort Claims Act, enacted as 28 U.S.C. §1346(b); the Alien Tort Claims Act, enacted as 28 U.S.C. §1350; and the North American Free Trade Agreement, enacted as 19 U.S.C. §3312(c)(2); and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) invoking the Equal Protection Clause of the United States Constitution and the Due Process Clause of the United States Constitution.

STATEMENT OF THE CASE

Petitioners are Mexican citizens and residents of Mexico, and a United States citizen and Mexican national who own, operate and/or have interests in Mexican businesses, principally involved in the transport and trucking of goods over the highway. Petitioners have submitted, or have sought to submit, applications with the United States Department of Transportation for

domestic trucking services operating permits that, under the North American Free Trade Agreement, 19 U.S.C. §3312 (hereinafter "NAFTA"), since December 18, 1995, should have allowed them to operate their trucks within the four southern border states of the United States: California, Arizona, New Mexico and Texas, and that should have allowed them to operate their trucks within the entire United States since January 1, 2000. The applications were submitted pursuant to provisions negotiated and adopted by the signatories to NAFTA. Petitioners have also sought to submit and have submitted applications with the United States Department of Transportation for the opportunity to invest in, own or control interests in United States-domiciled trucking firms also pursuant to NAFTA's provisions since December 18, 1995.

Petitioners allege that Respondents, for unlawful discriminatory reasons, employed policies, practices, patterns and procedures against them and other Mexican nationals similarly situated to applicants for operating permits who are not Mexican nationals, and who are domiciled in the countries which are parties to NAFTA, based primarily upon their national origin between December 18, 1995, and thereafter in the following areas: by Federal regulation requiring Mexican nationals to identify their national origin on applications for operating permits to provide cross-boundary trucking services from December 18, 1995, and thereafter, subsequently using the basis of national origin to deny or not process the applications; by Federal regulation requiring Mexican nationals to identify their national origin on applications for operating permits to provide cross-border and interstate trucking services from January 1, 2000, and thereafter, subsequently using the basis of national origin to deny or not process the applications; and, by Federal regulation requiring Mexican nationals to identify their national origin on applications for investment in, ownership of or control of interests in United States-domiciled trucking firms from December 18, 1995, and thereafter, subsequently using the basis of national origin to deny or not process the applications; and, by failing to properly

consider any such applications; and, by failing to approve any such applications. App. 6.

REASONS FOR GRANTING THE WRIT

I. THIS IS A CASE OF FIRST IMPRESSION THAT INVOLVES THE ISSUE OF WHETHER, IF THE UNITED STATES ENACTS A FREE TRADE AGREEMENT THAT GRANTS CERTAIN RIGHTS TO FOREIGN NATIONAL PETITIONERS (ONE OF WHOM IS A U.S. CITIZEN) AND FEDERAL ACTORS THEREAFTER DENY THE RIGHTS OF THE STATUTE TO PETITIONERS, CAN PETITIONERS MAINTAIN AN ACTION?

This case is about the right of a U.S. citizen, who is also a Mexican national, to be free of the effects of discrimination based on national origin, and about the rights of Mexican nationals who, when granted the right to apply for operating permits under NAFTA, are also summarily denied these rights by Federal actors. This case is about whether a deal is a deal or not. Simply put, this is a case in which the U.S. should be held to account for what it has agreed to do with those to whom it has granted rights in today's increasingly global marketplace. Moreover, the benefits of seeing the U.S. government abide by its international agreements would certainly accrue to U.S. citizens governed by those same agreements in the global marketplace. NAFTA is a Federal statute. Violation of a Federal statute should constitute a denial of equal protection under these facts. The NAFTA statute cannot define denial of equal protection or lack of subject matter jurisdiction such as to deprive Petitioners' rights under these facts. Otherwise, equal protection and subject matter jurisdiction are meaningless.

In this case, Petitioners were granted rights under NAFTA, and these rights were summarily denied to them. This is a case of first impression, as recognized by District Court Judge Emmet Sullivan in his Memorandum Opinion:

"this case presents compelling issues, at least one of which is of first impression in this Circuit." App. 16.

Thirty-four years ago, this Court recognized a private right of action for a Fourth Amendment violation of equal protection by Federal agents acting under color of Federal authority in the case of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Petitioners now request that this court enforce the law as to the rights granted the Mexican nationals – one of whom is also a U.S. citizen – who have been and were discriminated against on the basis of national origin by U.S. government officials in their implementation of NAFTA's provision for the grant of a permit to operate trucks in the continental U.S. In addition, Petitioners contend that this discrimination violates provisions of the Federal Tort Claims Act, enacted as 28 U.S.C. §1346(b), and the Alien Tort Claims Act, enacted as 28 U.S.C. §1350. The questions presented herein present a unique opportunity to clarify, and indeed, to settle, the nature and scope of the *Bivens* remedy as a vehicle for lawsuits involving discriminatory acts by Federal actors, in the context of increasingly utilized Free Trade Agreements, here NAFTA.

A. Under *Plyler v. Doe*, Constitutional Guarantees Extend to Any "Person" Who is Subject to the Laws of the United States

A *Bivens* action lies for discrimination on the basis of national origin and it would be of benefit to further brief and hear the issue of enforcement of these rights in the context of Free Trade Agreements enacted by Federal statute. The Constitution proscribes discrimination on the basis of national origin by the Federal government. Indeed, this Court has recognized that certain constitutional protections, like due process and equal protection, apply with full force to aliens within the territorial jurisdiction of the United States. See *Plyler v. Doe*, 457 U.S. 202, 211-212 (1982) ("[a]liens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth

Amendments.") *Plyler* established that undocumented aliens receive the same due process and equal protection *constitutional* rights afforded U.S. citizens when they: (1) come within the territory of the United States, and (2) develop substantial connections with this country. In *Plyler*, undocumented school-age children were denied the ability to attend the Texas public schools because of a statute passed by the state legislature in 1975. A class action suit was filed on their behalf based on a violation of equal protection on the basis of national origin. Justice Brennan, writing for the majority, applied a form of "heightened scrutiny" to extend the guarantees of equal protection to any "person" subject to the laws of the state. *Plyler* at 227.

Plyler is analogous to the instant case, in that trucking companies owned by Mexican nationals and by a U.S. citizen, who just happens to also be a Mexican national, have been granted certain limited rights to transact business within the United States by statute since 1995, yet they were denied the ability to exercise these same rights. The Bus Regulatory Reform Act of 1982, which placed restrictions upon motor carriers from Mexico against transporting long-haul trucks with the United States, and a subsequent Presidential Memorandum signed September 20, 1982 (excluding application of the act to Canadian-owned carriers) nevertheless contained three exceptions: (1) Mexican-owned carriers were allowed to enter a 20-mile commercial zone of U.S. border towns in 4 states: California, New Mexico, Arizona, and Texas; (2) Mexican-owned carriers were allowed to transit U.S. territory to reach destinations in Canada, and (3) certain Mexican-owned carriers which possessed operating rights to transit between the states prior to the 1982 act were "grandfathered" in by the act. Subsequent to the passage of the act and until its repeal by NAFTA in 1995, the Presidential Memorandum was extended uninterrupted with respect to Mexican-owned carriers in 1982, 1986, 1988, 1990, 1992, and 1995. App. 4-6. However, encoded in the Code of Federal Regulations, §1182.2, which is the application for an operating permit, is a unique provision

that requires the applicant to, in effect, answer the question: "Are you a Mexican national?" (See 49 C.F.R. §1182.2 (2005) (an applicant must indicate whether "any party acquiring any operating rights through the transaction is either domiciled in Mexico or owned or controlled by persons of that country").

When NAFTA came into effect on January 1, 1994, it included an additional provision, "Annex I", that allowed Mexican-owned businesses to obtain operating authority to provide cross-boundary trucking services in the four border states three years after the signing of the agreement, on December 1, 1995, and cross-border trucking services throughout the United States six years after the agreement's signing, January 1, 2000. App. 5. Additionally, it provided that with respect to investment by foreign nationals in U.S. trucking interests, a Mexican national would be able to invest in such a firm three years after NAFTA's signing, on January 1, 2000. App. 5. This meant that, unlike under the Bus Regulatory Reform Act, Mexican nationals could apply for trucking services operating permits and they were given the *right* both to operate across certain states, and invest in U.S.-owned businesses.

The provisions described herein placed Petitioners in the unique position of having rights voluntarily granted and recognized by the Federal government. Yet, having invested in and grown their businesses to a point, and even, as Petitioner Barriochoa, a U.S. citizen has, invested in American-owned businesses, Petitioners were denied the ability to exercise of these rights, because they are Mexican nationals. The Department of Transportation received 184 applications from Mexican nationals, including one U.S. citizen who also happens to be a Mexican national, and these applications were waiting to be processed. Yet, on December 18, 1995, Mr. Federico Pena, then-Secretary of the Department of Transportation, held a press conference in which a moratorium was announced on the processing of applications for operating permits by Mexican nationals and on the implementation of the investment provisions of NAFTA. This moratorium was in effect an Executive Order contravening the authority of a

Federal statute, 28 U.S.C. §1350. See *United States v. Pink*, 313 U.S. 203, 230-231 (1942), in which this Court held that an international agreement is effectively a federal statute with supremacy over lesser governmental orders:

> "Frequently the obligation of a treaty will be dependent on state law. *Prevost* v. *Greneaux*, 19 How. 1. But state law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement. See *Nielsen* v. *Johnson*, 279 U.S. 47. Then, the power of a State to refuse enforcement of rights based on foreign law which runs counter to the public policy of the forum (*Griffin* v. *McCoach*, 313 U.S. 498, 506) must give way before the superior Federal policy evidenced by a treaty or international compact or agreement. *Santovincenzo* v. *Egan*, *supra*, 284 U.S. 30; *United States* v. *Belmont*, *supra*."

In the instant case, the Federal actors violated the express provisions of NAFTA. Petitioners are not suing to declare NAFTA illegal; rather, Petitioners are suing because Federal actors violated Petitioners' equal protection rights to have their applications for permits processed. Thus, applying *Pink*, where Federal actors contravene the express provisions of an international agreement, NAFTA must prevail over former Secretary Pena's moratorium and executive orders.

B. *Bivens* Establishes a Cause of Action for Discrimination on the Basis of National Origin Where Congress Has Not Acted to Provide a Remedy

In *Bivens*, supra, this Court found that individual agents acting under color of law and in violation of the command of the Fourth Amendment gave rise to a cause of action for damages consequent on the agents' unconstitutional conduct. *Bivens* at 389. The premise for the Court's decision was in well-settled law, noting: "Federal courts

may use any available remedy to make good the wrong done." *Bell v. Hood*, 327 U.S. 678, 684 (1946). Lower courts have held that equal protection under the due process clause of Fifth Amendment supports *Bivens* actions alleging age, race and handicap discrimination as well. See, e.g., *Williams v. Meese*, 926 F.2d 994 (10th Cir. 1991). A *Bivens* action may also be based on a violation of the Fifth Amendment when a plaintiff alleges the existence of a protected property interest and a deprivation of that interest without due process of law. See, e.g., *Connelly v. Comptroller of Currency*, 876 F.2d 1209 (5th Cir. 1989).

In *Carlson v. Green*, 446 U.S. 14 (1980), this Court held that: "legislation may defeat a *Bivens* claim only if Congress provided 'an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective.'" See *La Compania Ocho, Inc. v. United States Forest Service*, 874 F.2d 1242, 1245 (D. New Mexico 1995) *quoting Carlson*, supra. While later U.S. Supreme Court cases such as *Schweiker v. Chilicky*, 487 U.S. 412 (1988) and *Bush v. Lucas*, 462 U.S. 367 (1983), refrained from considering a remedy's relative inadequacy, the question remains in this case, as more fully set forth below, whether a *Bivens* damages remedy should exist for Petitioners where NAFTA provided the right to obtain operating permits, which right was breached by official action of the executive branch of government, especially in regards to Petitioner Berriochoa Lopez, a citizen of the United States, who had to sell his interest in a U.S. domiciled trucking firm because the operating permit for that firm was in jeopardy if a Mexican national possessed an ownership interest. In addition, the Federal Tort Claims Act and Alien Tort Claims Act present issues for which a benefit will be gained from further briefing and argument.

Petitioners' Opposition to Motion to Dismiss recited that Petitioner Berriochoa Lopez was a U.S. citizen (App. 26), with dual citizenship in Mexico who, in fact, was forced to sell his interest in a U.S. domiciled trucking firm in 1999, because the operating permit for that firm was in

jeopardy if any Mexican national were to have an ownership interest. App. 40 The Memorandum Opinion of Judge Emmet Sullivan (See App. 3-17) appears to be silent regarding this issue, that is, whether at least Petitioner Berriochoa Lopez would have a valid cause of action under *Bivens*, the Federal Tort Claims Act and the Alien Tort Claims Act, because of his U.S. citizenship, and he was denied equal protection of the law solely because of his Mexican national origin. This issue was again raised on Appeal. App. 31-32.

To establish a violation of procedural due process in a *Bivens* action, the Petitioner must prove: (1) the existence of a protected property interest; (2) a deprivation of that interest under color of law; and, (3) a lack of due process. *Connelly*, 876 F.2d at 1211. To show a lack of due process, the Petitioner must show that the procedures made available were not merely insufficient or even inadequate, but that they were constitutionally inadequate, containing a defect so serious that they were fundamentally unfair. See *Mac'Avoy v. Smithsonian Institute*, 757 F.Supp. 60 (D.D.C. 1991); *Whitacre v. Davey*, 890 F.2d 1168 (1989), *cert. denied*, 497 U.S. 1038 (1990). Circuit courts have held that where there is a showing of deprivation of such basic due process rights as reasonable notice of a claim and a meaningful opportunity to respond, there is a violation of due process. See *Arcoren v. Peters*, 829 F.2d 671 (8th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988).

In addition to the property interests NAFTA conveyed to Petitioners, they are also entitled to equal protection under the law. The equal protection clause of the Fourteenth Amendment indicates that a state may not deny "any person within its jurisdiction the equal protection of the laws." U.S. Constitution, Amendment 14. *Swint v. City of Wadley*, 51 F.3d 988, 1000 (11th Cir. 1995) affirmed the district court's finding that "the equal protection right to be free from intentional racial discrimination was clearly established." This Amendment prohibits the government from treating similarly situated persons differently. Moreover, "[t]he Fifth Amendment's due process clause, applicable to the United States, has been construed to implicitly include

an equal protection guaranty generally as broad as that of the Fourteenth Amendment." *United States v. Gourley*, 168 F.3d 165, 171 (5th Cir. 1999). Since Petitioners were entitled under NAFTA to submit the permit applications for processing in the same manner as American-based trucking interests, they were on equal footing to the latter. Any purposeful actions in which applications were not processed (although Respondents only claim that the applications were not completely processed) because of discrimination on the basis of race, gender, alienage or national origin, is unlawful. *Hedges v. Poletis*, 177 F.3d 1071, 1075 (8th Cir. 1999) ("it is unlawful for state officials to discriminatorily enforce the laws against a disfavored class of persons solely on the basis of their membership in that class."). Since Petitioners, as Mexican nationals, are entitled to be applicants, a constitutional right has been established, and they have been discriminated against based on knowledge of their national origin.

Moreover, how can it be that Petitioner Berriochoa Lopez, a U.S. citizen, can be denied an operating permit just because he is also of Mexican national origin? Were he any other U.S. citizen, would he not have been allowed to obtain an operating permit?

1. The Burden is On the Respondent to Show the Existence of "Special Factors Counseling Hesitation" by the Judiciary

At the District court, Respondents contended two "special factors" exist under *Bivens*, factors that counsel against creating a judicial remedy for the unconstitutional implementation of NAFTA: (1) if recognition of a *Bivens* remedy would interfere with Executive and Legislative prerogative in the sensitive area of treaties and foreign affairs; and (2) if recognition of a Bivens remedy would impinge on NAFTA Article 20's controlling dispute resolution mechanisms agreed upon by NAFTA signatories. App. 37.

First, Petitioners' remedies would not impinge on the Executive and Legislative prerogatives in the sensitive

area of treaties and foreign affairs because Petitioners' claims are based upon constitutional law, U.S. statutory law, and *Bivens* case law.

Courts have held that there is no blanket rule when it comes to deciding whether a political question exists, an "application of the doctrine must be made on a 'case-by-case' basis." *Baker v. Carr*, 369 U.S. 186, 211 (1962). Petitioners contend that Respondents failed to approve applications by Mexican nationals based upon their origin as evidence of an ongoing and continuous pattern and practice of unlawful discrimination, as well as a violation of the equal protection and due process clauses of the Fifth Amendment. This Court must find that no political question exists because the remedies Petitioners seek are consistent with NAFTA, and are based upon United States law.

Second, Chapter 20 of NAFTA does not preclude Petitioners from seeking remedial application to this Court, but provides instruction for how parties to the treaty are to behave in the event of judicial application. NAFTA, Chapter 20, Article 2020(1), provides,

> "[i]f an issue of interpretation or application of this Agreement arises in any domestic judicial or administrative proceeding of a Party that any Party considers would merit its intervention, or if a court or administrative body solicits the views of a Party, that Party shall notify the other Parties and its Section of the Secretariat. The Commission shall endeavor to agree on an appropriate response as expeditiously as possible."

In *Schweiker v. Chilicky*, Justice O'Connor, writing for the majority, stated:

> "In sum, the concept of 'special factors counseling hesitation in the absence of affirmative action by Congress' has proved to include an appropriate judicial deference to indications that congressional inaction has not been inadvertent. When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional

> violations that may occur in the course of its administration, we have not created additional *Bivens* remedies." *Schweiker*, *supra*, at 423.

Petitioners, however, contend the instant case is distinguishable from *Schweiker*.

In *Schweiker*, Congress had provided an elaborate remedial scheme that provided a method of review and relief for the petitioners. In the instant case, neither NAFTA nor the applicable accompanying statutes provides any meaningful form of review or relief for petitioners. Despite Respondents' brazen claim that Chapter 20 of NAFTA provides an elaborate forum of review, a mere cursory review of the Chapter reveals that only parties to NAFTA agreement may participate in a primitive dispute process. In fact, the parties to the agreement did participate according to the terms of this Chapter, when Mexico, in 1998, formally requested the formation of an arbitral panel to hear the dispute of whether by failing to phase out U.S. restrictions on cross-boarder trucking and on Mexican investment in the U.S. trucking industry, the U.S. was in violation of the national treatment and most-favored-nation provisions of NAFTA. On February 1, 2001, the panel issued a final report, finding that the Transportation Department had received 184 applications from Mexican nationals, none of which had been approved. The report revealed U.S. laws and regulations denied operating authority in the U.S. to existing carriers if the applicant was a Mexican national, or if the carrier was controlled by Mexican nationals, as well as such authority to newly created U.S. domiciled carriers with Mexican investment. As such, it was futile for a Mexican national to file an application.

Petitioners also assert that Chapter 20 of NAFTA, cited by Respondents, incorporates those provisions of Chapter 11 as they pertain to private individuals seeking redress for a claim against a NAFTA government. Chapter 11's provisions contain a system for the settlement of

disputes between NAFTA investors and the government of another party to NAFTA. Yet, according to the NAFTA's Definitions, the term "investors" did not contemplate inclusion of Petitioners. (See 19 U.S.C. §§3301-3474). By its own terms, NAFTA excludes Petitioners from seeking redress under the only Chapter intended by the NAFTA parties to be used to settle disputes involving private citizens.

2. The *Bivens* Petitioner Looks to the Judiciary to Protect His or Her Constitutional Rights

Petitioners did not lose their ability to access this Court on *any* cause of action by the language limiting a private right of action under NAFTA. Petitioners are not now looking for this Court to enforce or implement NAFTA. Petitioners are instead requesting that this Court remedy the wrongs committed by Respondents as is permitted by United States law.

In *Davis v. Passman*, 442 U.S. 228, 242 (1979), this Court, in allowing a female employee to be awarded damages resulting from a discrimination claim against a U.S. Congressman despite no private right of action being granted to her under law stated:

> "[U]nless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights."

Thus, this Court fashioned an alternative remedy for violations of the law by a member of the Federal government.

3. The *Bivens* Remedy Includes Monetary Damages

Here, the United States of America has entered into an obligation akin to a contract with Canada and Mexico upon which its residents relied. The U.S. made a deal to allow Mexican nationals to obtain operating permits. This was put into the form of a Federal Statute, 19 U.S.C. §3312. Before NAFTA, most Mexican nationals did not have such rights. A Federal actor should not be able to unilaterally violate a Federal statute by issuing an executive order based solely on national origin (no Mexican national applications were processed) without being liable for damages for discrimination.

In determining what remedies were available to United States bondholders (who bought the bonds in reliance of being paid their value in gold) when the United States rescinded the gold standard, this Court, in *Perry v. United States*, 294 U.S. 330 (1935), stated:

> "The Question of Damages. In this view of the binding quality of the government's obligations, we come to the question as to the plaintiff's right to recover damages. That is a distinct question. Because the government is not at liberty to alter or repudiate its obligations, it does not follow that the claim advanced by the plaintiff should be sustained. The action is for breach of contract. As a remedy for breach, plaintiff can recover no more than the loss he has suffered and of which he may rightfully complain."

The *Perry* Court cited to the *Sinking Fund Cases*, 99 U.S. 700, 718-719 (1879), and stated:

> "The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen."

While NAFTA precluded a statutory right of action under its terms, it cannot prevent the Petitioners from asserting

their rights under *Bivens,* the Federal Tort Claims Act, and the Alien Tort Claims Act to the full measure of available remedies.

4. The Supervisory Respondents Also Discriminated against Petitioners on the Basis of National Origin

In *Cronn v. Buffington*, 150 F.3d 538, 544 (5th Cir. 1998), the court found two instances when individual supervisory defendants will be found personally liable for violation of a Constitutional right. "First, personal involvement in the acts causing the deprivation of a person's constitutional rights creates personal liability . . . Second, a supervisory official may be held liable if he implements a policy so deficient that the policy itself acts as a deprivation of constitutional rights." *Id.* at 544.

Each individually named Respondent "ha[s] knowingly and with deliberate indifference failed to approve applications for new and existing motor carrier operating permits made and submitted by persons of Mexican national origin, and has discriminated against those persons by reason of their national origin, resulting in the violation of each Petitioner's rights under the equal protection and due process clauses of the Fifth Amendment of the United States Constitution. Additionally, Petitioners pled each named Respondent, "as a matter of policy and as a pattern of practice and custom, have knowingly and with deliberate indifference failed to approve applications made and submitted by persons of Mexican national origin, for the opportunity to invest in, control or own U.S. domiciled trucking companies, and have discriminated against those persons by reason of their national origin, resulting in the violation of the Petitioners' rights under the equal protection clause and the due process clause of the Fifth Amendment of the United States Constitution.

The pleadings (see App. 18-32, 39-62) show individual personal involvement by asserting named Respondents failed to process and approve applications by Mexican nationals. Additionally, the pleadings allege that as a

matter of policy and as a pattern of practice and custom Respondents' with deliberate indifference failed to approve applications. This allegation satisfies the second prong of supervisory liability by asserting that Respondents implemented the policy of not processing applications, which in itself is so deficient that it acts as a deprivation of constitutional rights. As such, Petitioners sufficiently pled supervisory agent liability under *Bivens*.

II. THE FEDERAL TORT CLAIMS ACT, 28 U.S.C. §1346, IS AN APPROPRIATE REMEDY FOR DISCRIMINATION ON THE BASIS OF NATIONAL ORIGIN BY FEDERAL ACTORS WHO ACT UNDER COLOR OF AUTHORITY WHEN CONSIDERING APPLICATIONS BY MEXICAN NATIONALS FOR TRUCKING PERMITS WITHIN THE U.S.

In *Feres v. United States*, 340 U.S. 135 (1950), this Court identified the general framework in which the Federal Tort Claims Act should be analyzed:

> "This Act, however, should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole. The Tort Claims Act was not an isolated and spontaneous flash of congressional generosity. It marks the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit . . .
>
> At last, in connection with the Reorganization Act, it waived immunity and transferred the burden of examining tort claims to the courts. The primary purpose of the Act was to extend a remedy to those who had been without; if it incidentally benefited those already well provided for, it appears to have been unintentional."

The Respondents voluntarily, through freely negotiated terms with adjoining sovereign nations, entered into NAFTA with their eyes wide open. Once NAFTA was

ratified and enacted the Respondents were bound by its terms.

In *Block v. Neal*, 460 U.S. 289 (1983), this Court, in holding the government liable for the Farmers Home Administration's negligence in their processing of applications in connection with the construction of plaintiffs home, found in relation to the Federal Tort Claims Act:

> "However, the Court of Appeals found that respondent's complaint stated a claim for negligence under the principle 'that one who undertakes to act, even though gratuitously, is required to act carefully and with the exercise of due care and will be liable for injuries proximately caused by failure to use such care.' *Id.*, at 1181-1182, citing Restatement (Second) of Torts §323 (1965). It noted that, subject to express exceptions, the Tort Claims Act, 28 U.S.C. §2674, authorizes suit against the Government for the negligence of a Federal agency in performing a voluntary undertaking." *Id.*

A. The Court has Jurisdiction Under the Federal Tort Claims Act, 28 U.S.C. §1346, to Decide Petitioners' Claims for Breach of Duty

Petitioners are not claiming that Respondents have interfered with their contract rights. In fact, no contract right has been established for purposes of an action under the statute. Instead, Respondents have prevented Petitioners' individual applications from even being processed, pursuant to NAFTA's provisions, in conformity with the law, based on national origin. This has prevented Petitioners' applications from receiving an individualized assessment of their conformity with pertinent Federal law. As to Petitioner Berriochoa Lopez, a U.S. citizen, how can his permit have been denied except that he was of Mexican national origin? Petitioners, in reliance on NAFTA and the Respondents' obligations thereto, have detrimentally relied on the Respondents and expended significant

amounts to come into compliance with the terms of NAFTA and other Federal regulations. In *Sowell v. United States*, 835 F.2d 1133 (5th Cir. 1988), the court, in rejecting the government's claim that it could not be held liable for failing to process the plaintiff's life insurance policy application with a third party carrier stated:

> The fact that the measure of damages – loss of the value of insurance coverage – from the Army's failure to fulfill its duty to process the forms correctly is the same as it would have been for interfering with contract rights does not merge the duties. The same identity of damages was present in *Block v. Neal* where the loss caused by failure to supervise would be the same as the loss caused by the misrepresentation that the construction was proper – the value of deficiencies in the contractor's performance.

The court found that Louisiana law applied:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if: (a) his failure to exercise such care increased the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

In its explanation, the court reasoned:

> "In *Dornak v. Lafayette General Hospital*, 399 So.2d 168, 170 (La.1981), the court held that a prospective employer, once having taken upon itself to give prospective employees a physical examination, owed a duty to the potential employee to disclose a disease discovered during the examination. In explaining the basis of this duty, the court cited section 323 of the Restatement (Second) of Torts (1965) and explained that the obligation assumed by an employer is derived from the general principle that one who voluntarily

undertakes to perform an action must do so with due care."

B. If Respondents were Private Actors, There Would Be a Private Cause of Action Against Them for Discrimination in the District of Columbia.

The waiver of sovereign immunity provided by 28 U.S.C. §1346(b) is limited to circumstances "where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

1. Respondents would be in breach of District of Columbia human rights Law

The District of Columbia, similarly to many states, prohibits entities from aiding and abetting discrimination in the workplace based on, *inter alia*, national origin, as this represents a breach of the duty of care when obligations are undertaken. In the instant case the Respondents conspired to undermine Federal law, in order to disallow private parties from applying for Department of Transportation licenses that would allow them to transport goods, and or have an ownership interest in a local company based on the defendants' discriminatory actions against the parties based on the applicants national origin.[1]

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[1] District Of Columbia, Division I. Government Of District Title 2. Government Administration. Chapter 14. Human Rights Unit A. Human Rights Law Subchapter II. Prohibited Acts Of Discrimination Part B. Employment.

§2-1402.11. Prohibitions.

(a) *General.* – It shall be an unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based upon the actual or perceived: race, color, religion, *national origin* (italics added), sex, age, marital status, personal appearance, sexual orientation,

(Continued on following page)

Private parties in the District of Columbia are prohibited from these discriminatory practices, as are the Respondents in this action. The District of Columbia courts have found that the Human Rights Amendment is generally interpreted consistently with both Federal Title VII actions and 42 U.S.C. §1981 violations.

The DCHRA allows "[a]ny person claiming to be aggrieved" by a discriminatory practice to bring an action in court against the offending party. D.C.Code §1-2556(a). The Supreme Court has construed the nearly identical language of the Civil Rights Act of 1968 ("any person who claims to have been injured") to confer standing to the full extent that Article III of the Constitution permits. *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972); also see *Gray v. Greyhound Lines East*, 178 U.S. App. D.C. 91, 98 (1976) (construing Title VII language, identical to the DCHRA, to confer standing to the limits of Article III). Although this court is not bound by Article III, the use of the quoted phrase indicates to us that standing under the DCHRA is co-extensive with standing under Article III. Violation of a plaintiff's statutory rights may itself constitute an "actual or threatened injury" sufficient to confer Article III standing. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982). In *Havens*, this Court held that a tester who alleged a violation of her statutory right to truthful housing information satisfied the Article III requirement of injury in fact. *Id.* at 374. The plaintiff testers alleged a violation of their statutory right to be free from sexual harassment. As in *Havens*, the injury to their

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family responsibilities, disability, matriculation, or political affiliation of any individual:

(1) *By an employer.* – To fail or refuse to hire, or to discharge, any individual; or otherwise to discriminate against any individual, with respect to his compensation, terms, conditions, or privileges of employment, including promotion; or to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect his status as an employee;

rights was direct and personal. Furthermore, the statutory violation and accompanying injury exist without respect to the testers' intentions in initiating the encounters. "That the tester may have approached [appellant] fully expecting to [experience sex discrimination], and without any intention of [accepting an employment referral], does not negate the simple fact of injury within the meaning of [the DCHRA]." *Id.*; see also *Evers v. Dwyer*, 358 U.S. 202, 204 (1958) (fact that plaintiff boarded a racially segregated bus for the sole purpose of instituting litigation to challenge segregation was "not significant"). The testers in this case, therefore, had standing to sue for the alleged violation of their rights under the DCHRA.

Also instructive is the ruling of the Supreme Court of Massachusetts *Abrahaim v. the President and Fellows of Harvard College*, 731 N.E.2d 1075 (2000) in reviewing a jury verdict for discrimination by Harvard College against an *Armenian* employee on state tort grounds of, *inter alia*, aiding and abetting discrimination.

Thus, this Court, in interpreting the DCHRA, should treat the Respondents as a private party for purposes of determining liability and, under the facts of this case, as being in breach of the mandate of that law prohibiting discrimination based on national origin.

2. Respondents would be in breach of the special exception to the "Public Duty" doctrine

Under the public duty doctrine, "'a person seeking to hold the District of Columbia liable for negligence must allege and prove that the District owed a special duty to the injured party, greater than or different from any duty which it owed to the general public.'" *Powell v. District of Columbia*, 602 A.2d 1123, 1129 (*quoting Klahr v. District of Columbia*, 576 A.2d 718, 719 (D.C. 1990)). Liability arises out of a "special relationship" between the city and the injured party. *Id.* Such a special relationship can be established in two ways: (1) by a statute prescribing "'mandatory acts clearly for the protection of a particular

class of persons rather than the public as a whole'; or (2) 'a direct contact or continuing contact between the [injured party] and the governmental agency . . . and justifiable reliance on the part of the victim.'" *Id.* at 1129-30. See also *Morgan v. District of Columbia*, 468 A.2d 1306, 1314 (D.C. 1983) (en banc); *Platt v. District of Columbia*, 467 A.2d 149, 151 (D.C. 1983). The public duty doctrine has been described as an exception to the non-liability rule. *Morgan*, supra, at 1315; *Chandler*, supra, at 966-67. Petitioners contend that the allegations in their complaints bring them within the exceptions.

Respondents would be in breach of the special exception to the public duty doctrine as they have established a special relationship with Petitioners by agreeing to timetables, under NAFTA, by which they would be allowed to engage in business activities, in areas of the country not accessible by other foreign nationals; also Respondents willfully targeted them, based on Petitioners' national origin and disallowed each of them from having his application for an operating permit processed so that Respondents could determine if each Petitioner was eligible to have his application approved. Again, the processing of the applications was a ministerial, non-discretionary function. Approving or rejecting the applications once they were processed would have been a discretionary function.

3. Respondents would be in breach of their non-discretionary, ministerial duties to process Petitioners applications

Respondents have refused to process any and all applications submitted by Petitioners in violation of NAFTA, based on their national origin and without consideration of whether any of the applications was in compliance with or in violation of applicable Federal laws. Petitioner Berriochoa's trucking enterprise (as with all of the Petitioners) was in compliance with all Federal environmental, safety and other relevant standards. Petitioner Berriochoa had also invested in bringing his trucks into compliance with those standards, for the purpose of

conducting business within the United States pursuant to NAFTA's provisions. Yet, no one in the government was ever allowed to evaluate his application to do business because Respondents categorically violated their non-discretionary ministerial duty to process the applications. By negligently refusing to do so, Respondents have lost the ability to claim immunity for their actions.

In *Appleton v. United States*, 98 F.Supp.2d 30 (2000), the District Court for the District of Columbia found, in denying Defendant's Motion for Summary Judgment in connection with a Federal agency and the negligence of its employees in processing Federal applications:

> "The FTCA allows the government to be held liable 'in the same manner and to the same extent as a private individual under like circumstances. . . .' 28 U.S.C. §2674 ('the private-party provision'). In the August 31, 1999, Opinion, this court applied that provision to the facts here and concluded that, as a matter of law, the ATF had a duty to use due care in reviewing Mr. Appleton's import applications and may be held liable if shown to have breached that duty. This is the law of the case."
>
> "The court addressed and expressly rejected the government's argument that the government cannot be held liable under the FTCA for negligence in the performance of a 'core government function.' *See* Mem.Op. dated August 31, 1999. The court also rejected the government's argument that it could not owe a permit applicant any duty of care because it had no duty to act on a permit application at all. *Id.*"

The court in that case viewed with suspicion the circular argument the government advanced:

> "The ATF has never denied that if an application's manufacturer entry contains the name of a debarred entity, the examiner has no choice but to deny the application in compliance with the directive of the State Department. But, proof that ATF has no discretion to approve imports it

> *knows* are made by a debarred entity begs the central question, 'Do ATF examiners have discretion not to investigate an application which uses a generic manufacturer term which *might* represent a debarred entity?'"

Respondents were precluded by law to deny applications by trucking enterprises whose trucks were safe or in compliance with environmental standards. Thus, the question presented is whether Respondents have the discretion to refrain from processing of an application by a trucking enterprise that would otherwise be eligible to drive within the United States. The *Appleton* court ruled that this was a disputed material fact which precluded the entry of summary judgment under the Federal Tort Claims Act.

Congress and the President had the discretion to freely negotiate NAFTA's terms with Canada and Mexico. After NAFTA was ratified and implemented, the Respondents incurred liability for their actions in failing to follow its mandates, which failure led to the damages sustained by Petitioners.

4. Respondents have breached their duty to enforce the law

In *Campbell v. District of Columbia*, 580 A.2d 1295 (D.C. 1990) the court recognized a separate cause of action for the government's breach of its duty to enforce the law. In *High v. McLean Financial Corp*, 659 F.Supp. 1561 (D.D.C. 1987), the court held, in finding the existence of a cause of action sufficient to overcome the dismissal of a claim by an applicant whose loan application was negligently processed and the existence of a fiduciary relationship between the applicant's processor and applicant:

> "The Court is not convinced by defendant's argument that a fiduciary duty can *never* exist between a lender and a loan applicant. Most obviously, if a loan applicant has deposited escrow or other monies with the potential lender, his or her

> acts have given rise to a fiduciary duty on the lender's part. *See, e.g., Wagman v. Lee*, 457 A.2d 401 (D.C.), *cert. denied*, 464 U.S. 849 (1983). While the Complaint does not allege facts such as these, which would clearly create a fiduciary relationship, it does support an inference that defendant owed plaintiffs a fiduciary duty. District of Columbia law has deliberately left the definition of "fiduciary relationship" flexible, so that the relationship may change to fit new circumstances in which a special relationship of trust may properly be implied. *Urban Investments, Inc. v. Branham*, 464 A.2d 93, 105 (D.C. 1983) (*Mack, J., dissenting*)."

In reaching its conclusion, the court analyzed the District of Columbia's liberal framework in assessing fiduciary relationships.

Petitioners allege the Respondents entered into a fiduciary relationship with Petitioners when, in executing the provisions of NAFTA, Respondents accepted the applications submitted by Petitioners for processing. To recover for negligence in the District of Columbia, Petitioners must show: (1) the existence of a duty of care owed by Respondents to Petitioners, (2) a breach of that duty, (3) that Respondents' breach of duty was the proximate cause of Petitioners' injuries, and (4) that Petitioners sustained damages as a result thereof. *See, for example, Williams v. Baker,* 572 A.2d 1062 (D.C. 1990); *District of Columbia v. Cooper*, 483 A.2d 317, 321 (D.C. 1984). The law of negligence in the District of Columbia does not acknowledge differing standards of care, but rather, requires adherence to a uniform standard of conduct, which is reasonable care under the circumstances. *Morgan v. District of Columbia*, 468 A.2d 1306 (D.C. 1983). Under District of Columbia negligence law, by allowing Petitioners to enter the United States territory, by the printing applications, by distributing those applications, and subsequently, by then refusing to process the applications submitted, Respondents acted negligently and caused injury to Petitioners.

III. THE COURT HAS JURISDICTION UNDER THE ALIEN TORT CLAIMS ACT, 28 U.S.C. §1350[2], TO DECIDE PETITIONERS' CLAIMS FOR DISCRIMINATION ON THE BASIS OF NATIONAL ORIGIN BY FEDERAL ACTORS WHO ACT UNDER COLOR OF AUTHORITY WHEN CONSIDERING APPLICATIONS BY MEXICAN NATIONALS FOR TRUCKING PERMITS WITHIN THE U.S.

In *Argentine Republic v. Amerada Hess Shipping Corp.*, 109 S.Ct. 683 (1989), this Court described the Alien Tort Claims Act as follows:

> "Enacted by the First Congress in 1789, the Alien Tort Statute provides that '[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.' 28 U.S.C. §1350."

The Alien Tort Claims Act provides this Court with jurisdiction to decide the claims brought by Petitioners against Respondents for violations of NAFTA by the Respondents. The lower courts have ruled that the Alien Tort Claims Act is solely a jurisdictional statute, and that it does not waive sovereign immunity from holding Respondents accountable for their actions.[3] Thus, Respondents' claims

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[2] 28 U.S.C. §1350. Alien's action for tort

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

[3] See *Rosner v. United States*, 231 F.Supp.2d 1202 (S.D. Fla. 2002). The ATCA supplies Federal courts with jurisdiction over tort claims brought by aliens for violation of international law. 28 U.S.C. §1350 ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."). The ATCA, however, is a jurisdictional statute only and does not itself waive sovereign immunity. *Goldstar v. United States*, 967 F.2d 965, 968 (4th Cir. 1992) ("the Alien Tort Statute has been interpreted as a jurisdictional statute only – it has not been held to imply any waiver of sovereign immunity.").

of sovereign immunity are barred by the remedies otherwise afforded the Petitioners by the equal protection clause of the United States Constitution; the due process clause of the Fifth Amendment; the Federal Tort Claims Act, and their civil rights under *Bivens*. An action under the Alien Tort Claims Act can therefore lie.

Respondents cannot contend that the Alien Tort Claims Act grants this court jurisdiction to hear this matter, yet precludes this Court from deciding whether a violation has occurred, particularly when Petitioners have identified the aforementioned exceptions to Respondents' sovereign immunity claims.

Additionally, the plain language of the Alien Tort Claims Act gives this Court jurisdiction to hear this claim. The United States cannot now claim that other sovereign nations are subject to this statute and that it is not. Such a reading would fundamentally turn the law on its head.

A. Respondents are Not Shielded by the Defense of Sovereign Immunity

This Court has consistently found that, where the law provides alternative remedies, they act as a bar to a defense of sovereign immunity. As this Court held in *Carlson, supra*:

> In the absence of a contrary expression from Congress, §2680(h) this contemplates that victims of the kind of intentional wrongdoing alleged in this complaint shall have an action under FTCA against the United States as well as a *Bivens* action against the individual officials alleged to have infringed their constitutional rights. This conclusion is buttressed by the significant fact that Congress follows the practice of explicitly stating when it means to make FTCA an exclusive remedy. *Carlson* at 24.

B. Because Respondents' actions Violated the Alien Tort Claims Act, Petitioners May Proceed With a *Bivens* Action Pursuant to the Alien Tort Claims Act.

28 U.S.C. §1361 grants this Court jurisdiction to compel an officer of the United States to perform his duty:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

This Court's analysis, in *Judicial Watch Inc. v. National Energy Policy Development Group, et al.*, 219 F.Supp.2d 20 (D.D.C. 2002), of a statutory scheme that did not provide for a private right of action, in a case where plaintiffs rights were violated, is applicable:

> "Following *Reich*, this Court holds that the mandamus statute may provide an avenue to remedy violations of statutory duties even when the statute that creates the duty does not contain a private cause of action. Accordingly, this Court must now turn to the question of whether FACA creates such a duty.

In analyzing the Respondents' duties under the statute specified to determine whether a non-discretionary duty was implicated, the Court continued:

> "2. Non-Discretionary Duty
>
> When a Federal official has an obligation to perform a ministerial or non-discretionary duty, a Federal district court may issue a writ of mandamus under §1361 to compel that officer to fulfill the obligation. *National Wildlife Fed'n v. United States*, 626 F.2d 917, 923 (D.C.Cir. 1980). However, mandamus is a 'drastic remedy, to be invoked only in extraordinary situations.' *Consolidated Edison Co. of New York v. Ashcroft*, 286 F.3d 600, 605 (D.C.Cir. 2002); *In re Papandreou*, 139 F.3d 247, 249 (D.C.Cir. 1998). As the Supreme Court has explained, a 'ministerial duty'

> [is] equivalent to a positive command. . . . '[W]here the duty is not thus plainly prescribed, but depends on a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus.' *Wilbur v. United States*, 281 U.S. 206, 218-19 (1930) (*quoted in Consolidated Edison*, 286 F.3d at 605 (C.A.D.C. 2002))."

Thus, where a non-discretionary action is involved, it has been found that a court has the power to involve itself in righting the wrong. In this case, NAFTA is explicit in specifying the Respondents' obligations toward the Petitioners. Respondents have a ministerial, non-delegable duty to process the Petitioners' applications.

Petitioners acknowledge that Respondents could have rejected individual applications for reasons consistent with NAFTA and with the laws of the United States; however, once Respondents have admitted foreign nationals into this territory, and after NAFTA was ratified and implemented, they came under an affirmative duty not to arbitrarily or capriciously refuse to process *every single application based solely on the national origin of the applicants*, and particularly where an applicant is an American citizen, and in addition where, under NAFTA, Petitioners have the *right* to submit such applications. Such duties then became non-discretionary.

In *Bernal v. Fainter*, 467 U.S. 216 (1984), this Court found, in a case overturning a state law that denied foreign residents from becoming notaries:

> "As a general matter, a state law that discriminates on the basis of alienage can be sustained only if it can withstand strict judicial scrutiny. In order to withstand strict scrutiny, the law must advance a compelling state interest by the least restrictive means available.
>
> [C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and

> insular' minority . . . for whom such heightened judicial solicitude is appropriate. *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (footnotes and citations omitted).
>
> Only rarely are statutes sustained in the face of strict scrutiny. As one commentator observed, strict-scrutiny review is 'strict' in theory but usually 'fatal' in fact. Gunther, *The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv.L.Rev. 1, 8 (1972).

In view of NAFTA, of Federal laws prohibiting discrimination, and of an arbitral panel finding that Mexican nationals should be allowed to travel in the United States and that Respondents specifically targeted Mexican nationals in order to prohibit them from venturing further into the country, even for business purposes, Respondents, and therefore, the United States, are liable for a breach of duty under the Alien Tort Claims Act.

CONCLUSION

For the foregoing reasons, Petitioners request this Court to grant their Petition for a Writ of Certiorari.

DATED this 15th day of February, 2005.

Respectfully submitted,

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-5155 **September Term, 2004**

02cv02489

Guillermo Berriochoa Lopez, et al.,
Appellants

v.

William J. Clinton, et al.,
Appellees

BEFORE: Sentelle, Henderson, and Tatel, Circuit Judges

ORDER

(Filed Nov. 17, 2004)

Upon consideration of the motion for summary affirmance, the opposition thereto, and the reply, it is

ORDERED that the motion be granted. The merits of the parties' positions are so clear as to warrant summary action. *See Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court properly dismissed appellants' complaint for lack of subject matter jurisdiction pursuant to 19 U.S.C. § 3112.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

/s/ [Illegible]
/s/ [Illegible]
/s/ [Illegible]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLOMBIA

GUILLERMO BERRIOCHOA LOPEZ, *et al.* Plaintiffs, v. UNITED STATES OF AMERICA, *et al.* Defendants	Civil Action No. 02-2489 (EGS)

MEMORANDUM OPINION

I. Introduction

Plaintiffs, Mexican citizens who own or have an interest in Mexican trucking companies, bring this suit against the United States, several government agencies, and former high-ranking government officials, including President William J. Clinton, Secretary of Transportation Federico Peña, and other Department of Transportation officials. Plaintiffs, who also seek to certify a class pursuant to Fed. R. Civ. P. 23,[1] bring tort claims under the Federal Tort Claims Act ("FTCA"), the Alien Tort Claims

[1] The Court shall decide defendants' Motion to Dismiss without reaching the issue of class certification. *See Curtin v. United Airlines, Inc.*, 275 F.3d 88, 92-93 (D.C. Cir. 2001) (holding that district court did not abuse its discretion in granting defendant's motion for summary judgment where the merits of plaintiff's claim could be readily resolved); *see also Kas v. Financial General Bankshares, Inc.* 796 F.2d 508, 510 (D.C. Cir. 1986) (noting that district court properly dismissed case under Fed. R. Civ. P. 12(b) (6) and that reviewing court need not reach appellants' contention that court erred in refusing to certify a class under Fed. R. Civ. P. 23).

Act ("ATCA") and various constitutional torts claims under *Bivens v. Six Unnamed Federal Narc. Agents*, 403 U.S. 388 (1971).[2] Defendants filed a Motion to Dismiss under Fed. R. Civ. P. 12(b) (1) and 12(b) (6).[3]

II. Legal Background

Plaintiffs' suit arises from the conflict between the North American Free Trade Agreement ("NAFTA") and certain domestic legislation barring Mexican citizens from gaining permission to operate as motor carriers in the United States.

In 1982, Congress passed the Bus Regulatory Reform Act, creating a moratorium on the Interstate Commerce Commission's ("ICC") issuance of new motor carrier operating authority to foreign carriers. Pub. L. No. 97-261, § 6(g), 96 Stat. 1102, 1107-08 (1982). Later that year, the

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[2] In their opposition to defendants' Motion to Dismiss, plaintiffs allege violations of 42 U.S.C. 51981 and the D.C. Human Rights Act. Pls.' Opp'n. at 34. Because plaintiffs did not raise these allegations in their complaint and, as of March 23, 2004, have not filed an amended complaint, the Court will not consider them.

[3] As a preliminary matter, the Court notes that plaintiffs filed almost an identical suit under *Bivens* and 42 U.S.C. § 1981 against the current Secretary of Transportation, among others, in the U.S. District Court for the Southern District of Texas. *Berriochoa-Lopez v. Mineta*, Civ. A. No. B-01-208 (S.D. Tex. Jan. 13, 2003). There, the Magistrate Judge found subject matter jurisdiction because plaintiffs were alleging violations of a federal statute and the Equal Protection component of the Fifth Amendment (as part of their *Bivens* action). However, the Magistrate Judge recommended that the case be dismissed for lack of personal jurisdiction over the defendants. The district court adopted the Magistrate Judge's report and granted the defendants' Motion to Dismiss. The plaintiffs' appeal is still pending before the Court of Appeals for the Fifth Circuit (Case No. 03-40350).

President signed a memorandum excluding Canada from the prohibition and declaring explicitly that the moratorium would be enforced against Mexico. The President and his successors extended the moratorium in the subsequent years of 1984, 1986, 1988, 1990, 1992, and 1995.[4]

In 1995, Congress passed the ICC Termination Act, which transferred motor carrier operating authority responsibilities to the Department of Transportation ("DOT"), Pub. L. No. 104-88, §§ 103-104, 109 Stat. 803 (1995) (codified as amended at 49 U.S.C. § 13501 (2000)). The Act extended the validity of existing regulations, including the 1982 Bus Regulatory Reform Act, but gave DOT the power to modify or eliminate the existing moratorium. *See* 49 U.S.C. § 13902(c) (4) (B) (2000).

By that time, however, the United States had already entered into NAFTA, which was signed by the three nations on December 18, 1992, and took effect January 1, 1994. In Annex I of NAFTA, the parties agreed that Mexican nationals would be permitted to obtain operating authority to provide cross-border trucking services in four border states three years after the signing of the agreement (December 18, 1995) and that Mexican nationals would be authorized to operate throughout the United States six years after the treaty signing (January 1, 2000). Additionally, Annex I provided that foreign nationals, specifically Mexicans, would be able to invest in U.S.-domiciled trucking companies as of December 18, 1995 (three years after the treaty was signed).

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[4] *See* 60 Fed.Reg. 12,393 (Mar. 2, 1995); 57 Fed.Reg. 44,647 (Sept. 25, 1992); 55 Fed.Reg. 38,657 (Sept. 17, 1990); 53 Fed.Reg. 36,430 (Sept. 15, 1988); 51 Fed.Reg. 34,079 (Sept. 23, 1986); and 49 Fed.Reg. 35,001 (Aug. 30, 1984).

Since at least 1995, the United States government has been and remains incapable of agreeing on unified medical, vehicular, and safety compliance standards under NAFTA. The United States announced that it would accept Mexican applications for operating authority, but no applications – including the 184 applications submitted since July 20, 1999 – have been approved since the moratorium went into effect. The United States maintains the moratorium by requiring applicants to indicate on the standard forms whether they are Mexican nationals. *See* 49 C.F.R. § 1182.2(a) (10) (2000). The United States also maintains a complete ban on Mexican nationals owning or controlling U.S. cargo and passenger motor carrier service providers.

In 1998, Mexico formally requested, under the dispute resolution mechanism of NAFTA, the formation of an arbitral panel to decide whether the U.S. restrictions of cross-border trucking operations and investment violated the terms of NAFTA. All three signatories to the treaty participated in the hearings, and the panel issued its final report in February 2001. *In the Matter of Cross Border Trucking Services*, Secretariat File No. USA-MEX-98-2008-01 (Feb. 6, 2001), available at http://dt.ses.dot.gov/docimages/pdf63/128100_web.pdf (last visited March 23, 2004). The Arbitral Panel found that the United States' fears over Mexican compliance with relevant standards were an insufficient reason to refuse to comply with the provisions of Annex I but that the United States was not required to treat Mexican companies and individuals the same as those from the United States and Canada when disparate treatment served the purpose of promoting compliance with established rules. Nevertheless, the panel

found that no application from a Mexican national had been or would be approved. *Id.* at ¶¶ 295-298.

The United States concedes that its policies violated Annex I of NAFTA but notes in its Motion to Dismiss that, since the panel issued its report, the Government has taken steps to ameliorate the situation, including lifting the ban on the issuance of operating permits to motor carriers domiciled in the United States but owned or controlled by Mexican nationals. In addition, the United States has taken measures that signal a further loosening of the moratorium, but those measures have been temporarily halted, by a challenge in the Ninth Circuit unrelated to this lawsuit.[5]

III. Discussion

A. NAFTA Implementation Legislation

The United States signed NAFTA with the heads of state of Canada and Mexico on December 18, 1992. President Clinton submitted the Agreement to Congress the following year, and Congress passed comprehensive legislation to enact the Agreement into law. North American Free Trade Agreement Implementation Act, Pub. L. No. 103-82, 107 Stat. 2057 (1993) (codified as amended at 19 U.S.C. §§ 3301-3473 (2000)).

Chapter Twenty of the Implementation Act, "Institutional Arrangements and Dispute Settlement Procedures,"

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[5] *See Public Citizen v. Department of Transp.*, 316 F.3d 1002, 1032 (9th Cir. 2003) (holding that DOT failed to conduct proper environmental inquiry before approving lifting of moratorium on Mexican motor carrier operators), *cert. granted*, 124 S.Ct. 957 (U.S. Dec. 15, 2003) (No. 03-358).

establishes a comprehensive, three level process for consideration and review of issues over which the party states disagree. *See* 1993 WL 561199 at *1 (N.A.F.T.A.). The process begins with consultations between the affected countries. *Id.* at *2. In the United States, if the parties cannot resolve the matter, the issue goes before the Federal Trade Commission ("FTC"). *Id.* The parties can then request the formation of an independent panel, much like Mexico has done here, that is responsible for fact-finding and for issuing initial and final reports. *Id.* If, after the panel's final report, the parties are still unable to agree upon an appropriate remedy, they are required to decide upon "trade compensation for the complaining party." *Id.* at *4. Finally, if no settlement has been reached within thirty days of the final panel report, the aggrieved party can suspend the other party's NAFTA benefits equivalent to those that the panel has concluded were impaired. *Id.*

Outside of this dispute resolution procedure, Congress specifically addressed potential conflicts between NAFTA and existing as well as future federal law. *See* 19 U.S.C. § 3312 (2000). Section 3312 (a) (1), bearing the heading "United States law to Prevail in a Conflict," prescribes that "[n]o provision of the Agreement, nor the application of any such provision to any person or circumstance, which is inconsistent with any law of the United States shall have effect." The subsections of the stature that follow identify and review in painstaking detail the construction to be given to NAFTA, the parties who can bring a lawsuit, and the parties who can be sued. For the reasons explained below, these explicit statutory commands divest the Court of jurisdiction and require the dismissal of plaintiffs' lawsuit.

B. Subject Matter Jurisdiction

Subject matter jurisdiction is a "threshold matter" in all cases, such that without it, "the court cannot proceed at all in any cause." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 7 Wall. 506, 514 (1868)). When jurisdiction "ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *McCardle*, 7 Wall. at 514.

The D.C. Circuit has stated in unequivocal terms that "[j]urisdiction must be established before a federal court may proceed to any other question." *Galvan v. Federal Prison Indus.*, 199 F.3d 461, 463 (D.C. Cir. 1999). Consequently, this Court must determine whether it has subject matter jurisdiction before considering defendants' Rule 12(b) (6) motion to dismiss for failure to state a claim because, rather than challenge this Court's jurisdiction, the latter motion challenges "the legal sufficiency of the complaint." *Kingman Park Civic Ass'n v. Williams*, 348 F.3d 1033, 1040 (D.C. Cir. 2003).[6]

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[6] Because jurisdiction is a threshold requirement, dismissal for lack of subject matter jurisdiction represents the "best and narrowest ground" on which the Court can resolve this case. *See Air Courier Conference of America v. American Postal Workers Union, AFL-CIO*, 498 U.S. 517, 531 (1991) (Stevens, J., concurring in the judgment) ("Faithful adherence to the doctrine of judicial restraint provides a fully adequate justification for deciding this case on the best and narrowest ground available."); *see also Brown v. Plaut*, 131 F.3d 163, 170 (D.C. Cir. 1997) ("We do not think it necessary or even useful to resolve so many complex and fact-specific issues in the context of this case [when] it may be possible to decide on far narrower grounds.").

C. Rule 12 (b) (1) Standard

The appropriate standard for a motion to dismiss under Fed. R. Civ. P. 12 (b) (1) has been well-established by both the Supreme Court and the D.C. Circuit. As this Court has stated, "a complaint may be dismissed for lack of subject matter jurisdiction only if 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim [that] would entitle him to relief.'" *National Wrestling Coaches Ass'n v. U.S. Dept. of Educ.*, 263 F. Supp. 2d 82, 100 (D.D.C. 2003) (quoting *Empagran, S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338, 343 (D.C. Cir. 2003) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Additionally, the Court "assumes the truth of the allegations made and construes them favorably to the pleader." *Empagran*, 315 F.3d at 343; *see also Artis v. Greenspan*, 158 F.3d 1301, 1305-6 (D.C. Cir. 1998) (explaining that the non-moving party "is entitled to all reasonable inferences that can be drawn in her favor") (emphasis in original)). And, because a challenge to subject-matter jurisdiction calls into question the Court's power to hear the case, the Court may consider, where necessary materials outside of the pleadings. *See Teva Pharmaceuticals, USA., Inc., v. U.S. Food and Drug Admin.*, 182 F.3d 1003, 1008 (D.C. Cir. 1999); *Artis*, 158 F.3d at 1305-6.

D. 19 U.S.C. § 3312 (C) (2) Acts as a Complete Bar to Private Causes of Action

Plaintiffs make three principal factual allegations: 1) that defendants have refused to process and/or approve their applications for permits to operate within the four border states of California, Arizona, New Mexico, and Texas since December 18, 1995; 2) that defendants have

refused to process and/or approve their applications for permits to operate within the entire United States since January 1, 2000; and 3) that defendants have refused to process their applications to invest in, own, or control United States-domiciled trucking firms since December 18, 1995. In acting or failing to act, plaintiffs argue, defendants have not only violated their obligations under NAFTA, but have also committed the intentional torts listed in their complaint,[7] giving this Court subject matter jurisdiction.

In their Motion to Dismiss, defendants argue that plaintiffs' Federal Tort Claims Act claims are: 1) time-barred because they were not filed within two year of date of accrual; 2) time-barred because plaintiffs failed to file a complaint within six months of the agency's denial of their claim; 3) barred because there is no state law analog; and 4) precluded by the FTCA's exemptions for intentional and constitutional torts. Defs.' Mot. to Dismiss at 15-22.[8]

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[7] Those intentional torts are: Intentional Interference with Prospective Economic Advantage; Intentional Interference with Contractual Relations; Breach of Fiduciary Duty; and Taking of Property without Just Compensation.

[8] Until recently, the D.C. Circuit treated a statute of limitations defense offered by the U.S. Government as a challenge to the Court's jurisdiction, not as an affirmative defense. *See Harris v. Federal Aviation Administration*, 353 F.3d 1006, 1013 n. 7 (D.C. Cir. 2004). However, in *Harris*, the Court of Appeals acknowledged that the Supreme Court's decision in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990), had established that the rebuttable presumption in favor of equitable tolling in suits against private actors applied equally to suits against the United States. 353 F.3d at 1013 n.7.

Moreover, the Court of Appeals cited with approval *Leavall v. Kieffer*, 189 F.3d 492, 494-95 (7th Cir. 1999), which it read as holding that the "statute of limitations [is] not jurisdictional but instead [an] affirmative defense." *Harris*, 353 F.3d at 1013 n.7. In *Leavell*, Judge

(Continued on following page)

Because all of plaintiffs' claims stem from NAFTA violations, 19 U.S.C. § 3312(c) bars the instant suit. Entitled "Effect of Agreement with respect to private remedies," section 3312(c) states, in pertinent part,

> No person other than the United States . . . shall have *any* cause of action or defense under the Agreement or by virtue of Congressional approval thereof, or . . . may challenge, in *any* action brought under *any* provision of law, *any* action or inaction by *any* department, agency, or other instrumentality of the United States . . . on the ground that such action or inaction is inconsistent with the Agreement. (emphasis added).

The statutory prohibition on *any* suits arising from alleged NAFTA violations is explicit and, as a unanimous Supreme Court recently confirmed, "where the words of the statute are unambiguous, the 'judicial inquiry is complete.'" *Desert Palace, Inc. v. Costa*, 539 U.S. ___, 123 S.Ct. 2148, 2153 (2003) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)); *see Williams v. Taylor*, 529 U.S. 420, 431 (2000) ("We give the words of a statute their 'ordinary, contemporary, common meaning,' absent an indication Congress intended them to bear some different import.") (quoting *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S.

Easterbrook stated that a *Bivens* claim presents a federal question, giving the district court subject matter jurisdiction under 28 U.S.C. § 1331. The statute of limitations, he said, does not "affect the district court's jurisdiction." *Leavell*, 189 F.3d at 494.

Thus, defendants' argument that equitable tolling applies to suits against the United States only "sparingly" seems foreclosed by both *Harris* and *Chung v. U.S. Department of Justice*, 333 F.3d 273, 276 (D.C. Cir. 2003) (holding that presumption in favor of equitable tolling applied to suit against the Department of Justice under the Privacy Act). *See* Reply to Pls.' Opp'n at 17.

202, 207 (1997)). Because the prohibition extends to suits brought "under *any* provision of law," the statute bars all of plaintiffs' claims, both the statutory ones and the *Bivens* action.

When faced with comparably clear statutory language precluding judicial review of agency decisions, the D.C. Circuit has not hesitated to dismiss suits for lack of subject matter jurisdiction. *See National Coalition to Save Our Mall v. Norton*, 269 F.3d 1092, 1095 (D.C. Cir. 2001). In *Norton*, a group of organizations filed suit seeking an injunction to halt the construction of a World War II monument on the National Mall. While the suit was pending in the district court, Congress passed a statute that exempted the construction of the memorial and the agency decisions underlying that construction from judicial review. Pub. L. No. 107-11, § 3, 115 Stat. 19 (2001) ("The decision to locate the memorial at the Rainbow Pool site . . . and the actions by the Commission[s] . . . and the issuance of the special use permit . . . shall not be subject to judicial review."). In affirming the district court's decision to dismiss the suit for lack of subject matter jurisdiction, the Court of Appeals noted that "[i]t [was] hard to see how Congress could make" its intent "clearer that it has here." *Norton*, 269 F.3d at 1095. The Court find that the language in section 3312 precluding private parties from challenging the state and federal governments' compliance with NAFTA is, if possible, an even clearer expression of Congressional intent than in *Norton*.

The D.C. Circuit's most recent analysis of statutory language intended to preclude judicial review is not to the contrary. *See General Electric Co. v. Environmental Protection Agency*, No. 03-5114, slip op. at 5 (D.C. Cir. Mar. 5, 2004) (reaffirming that "when the statutory language is

straightforward, there is no need to resort to legislative history."). At issue in *General Electric* was a provision of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") that divested the federal courts of jurisdiction to review "any challenges to removal or remedial action selected under section 9604 [of Title 42, United States Code] or to review any order issued under section 9606(a)." 42 U.S.C. § 9613(h) (2000). The district court rejected General Electric's contention that its facial constitutional challenge fell outside the scope of the statutory language and dismissed the case for lack of subject matter jurisdiction. In reversing, the D.C. Circuit emphasized that Congress had "enumerated *only two* types of challenges over which the federal courts lack jurisdiction" and that the apparently broad "any challenges" language was not "without qualification." *Id.* at 6 (emphasis added).

The language of the NAFTA Implementation Language, in contrast, is decidedly "without qualification." Whereas the provision before the court in *General Electric* limited judicial review of challenges brought under a few specific statutory sections, 19 U.S.C. § 3312(c) precludes suits "brought under *any* provision of law." (emphasis added). The plain language of the NAFTA Implementation Legislation thus requires the dismissal of all suits whose sole claim to legal relief stems from alleged noncompliance with NAFTA by federal or state government officials.

Not surprisingly, two district courts that have recently examined the NAFTA implementation legislation have concluded that the statutory language bars private causes of action arising out of alleged NAFTA violations. *See LeClerk v. Webb*, 270 F. Supp. 2d 779, 804 (E.D. La. 2003); *see also Friedman v. United States*, 2003 WL 1460525 at

11 (S.D.N.Y. 2003) (observing that the legislation "does not allow for a private right of action against any department or agency of the United States."). In *LeClerc*, a non-immigrant Canadian citizen challenged a Louisiana regulation requiring that all applicants to the state bar be United States citizens or permanent residents. In responding to plaintiff's allegations that the regulation violated NAFTA, defendants argued simply that an adjoining clause of section 3312 (c) barred the suit: "No person other than the United States . . . may challenge, in any action brought under any provision of law, any action or inaction by . . . any State . . . " The court agreed, dismissing plaintiff's suit on the ground that "NAFTA's enabling legislation expressly limits such a legal challenge to the United States." *LeClerc*, 270 F. Supp. 2d at 804.

The language in section 3312(c) addressing challenges to treaty-related actions of the federal government mirrors the language that refers to actions by state governments. This Court has no reason to depart from the plain language of the statute to infer a cause of action where one is plainly prohibited.

In their Opposition to defendants' Motion to Dismiss, plaintiffs dedicate a scant two paragraphs to defendants' powerful statutory argument. Oddly, plaintiffs claim that they are not seeking "to enforce or implement NAFTA," but that they are instead attempting to "remedy the wrongs of the Defendants" through a mandamus action. Pls.' Opp'n at 17. The complaint, however, is based strictly in tort and makes no mention of a mandamus remedy. Compl. at 21. Outside of individual rights arguments, complete with citations to a James Madison speech to Congress and to *Marbury v. Madison*, plaintiffs fail to

present any compelling reason for the Court to ignore the plain language of the NAFTA implementation legislation.

IV. Conclusion

As demonstrated by the parties' comprehensive submissions, this case presents compelling issues, at least one of which is of first impression in this Circuit. However, the importance of those issues does not relieve the Court of its initial duty to assure itself that it has jurisdiction over the matter. Because this Court lacks jurisdiction to hear this case, the present action must be dismissed.

An appropriate Order accompanies this Opinion.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUILLERMO BERRIOCHOA LOPEZ, *et al.*	)	
Plaintiff,	)	Civil Action No. 02-2489 (EGS)
v.	)	
UNITED STATES OF AMERICA, *et al.*	)	
Defendant.	)	

ORDER

Pursuant to the memorandum Opinion entered this same day and for all the reasons set forth therein, it is by the Court, hereby,

ORDERED than defendants' Motion to Dismiss is **GRANTED**; and it is

FURTHER ORDERED that this case shall be removed from the active calendar of this Court.

Signed: Emmet G. Sullivan
United States District Judge
March 23, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CASE NUMBER 1:02CV02489

GUILLERMO BERRIOCHOA LÓPEZ; TRANSPORTES INTERMEX, S.A. de C.V.; S'ANTONIO TRANSPORTES, S.A. de C.V.; JOSÉ SILVINO MAGAÑA LÓPEZ; JOSÉ ALFREDO MAGAÑA LÓPEZ; MIGUEL ÁNGEL DE LA ROSA SANCHEZ; SERVICIO TÉCNICO AUTOMOTRIZ PERISUR, S.A. de C.V.; TOMAS DE LA ROSA PARRA; ERNESTO VALLET HACES; MAX E. BARTON; CARLOS BERRIOCHOA,

Plaintiffs,

vs.

WILLIAM J. CLINTON; FEDERICO F. PEÑA; RODNEY E. SLATER; KENNETH R. WYKLE; RICARDO MARTINEZ, MD; UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF TRANSPORTATION; FEDERAL HIGHWAY ADMINISTRATION; NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION; FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION; and Does 1-100, inclusive,

Defendants

JUDGE:
Emmet G. Sullivan

DECK TYPE:
Contract

DATE STAMP:
12/18/2002

1. **VIOLATION OF THE FEDERAL TORT CLAIMS ACT UNDER 28 U.S.C. §1346(b);**
2. **VIOLATION OF THE ALIEN TORT CLAIMS ACT UNDER 28 U.S.C. §1350; AND,**
3. **VIOLATION OF FEDERAL CIVIL RIGHTS UNDER *BIVENS***

DEMAND FOR JURY TRIAL

NATURE OF ACTION

(Filed Dec. 18, 2002)

1. Plaintiffs and proposed class representatives are Mexican citizens and residents of Mexico, who own, operate and/or have interests in Mexican businesses principally involved in the transport of goods over the highway in Mexico. Plaintiffs have submitted or have sought to submit applications with the United States Department of Transportation for operating permits that would have allowed them to operate their tracks

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUILLERMO BERRIOCHOA, ET AL,	)	
Appellants/Plaintiffs,	)	
v.	)	**Civ. A. No. 02-2489 (EGS)**
UNITED STATES OF AMERICA, et al,	)	
Defendants	)	

OPPOSITION TO MOTION TO DISMISS

Pursuant to Fed.R.Civ.P. 12, Plaintiffs Guillermo Berriochoa Lopez, et al., Oppose Defendants' Motion to Dismiss and hereby move this Honorable Court to deny Defendants' Motion. A memorandum of points and authorities and proposed order are included with this Opposition.

Respectfully Submitted,

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DATED: September 3, 2003

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* * *

thus leading to the remedy for the damages sought in this action. As will be reiterated throughout this Opposition, Plaintiffs are not now requesting that this Court implement NAFTA, but are demanding the Defendants remedy the damage wreaked by the Defendants willful violation of NAFTA's terms, and their obligations pursuant thereto, to the detriment of the Plaintiffs who relied on them.

This case arises out of GUILLERMO BERRIOCHOA, et al's, complaint filed on December 18, 2001 for (1) Violation of Federal Civil Rights Under 42 U.S.C. § 1981, (2) Violation of Federal Civil Rights under Bivens, (3) violation of the Federal Tort Claims Acts, 28 U.S.C. § 1346, and (4) Alien Tort Claims Act, 28 U.S.C. § 1350. This lawsuit is an action seeking recovery of damages resulting from the Defendant officials' discrimination against a class of Mexican citizens, in violation of NAFTA, denying equal protection of the law and their taking of a property interest without due process of law. The North American Free Trade Agreement (NAFTA) is the law of the United States, and its terms are supreme to, and modify, inconsistent regulations promulgated by executive branch agencies and contrary Presidential Memoranda.

The individual defendants filed a Motion to Dismiss and Memorandum in Support Thereof, pursuant to Rules 12(b) (1)-(3) and (6) of the Federal Rules of Civil Procedure. Following is Plaintiff's Opposition.

II. STATEMENT OF FACTS.

Plaintiffs and proposed class representatives are Mexican citizens and residents of Mexico, who own, operate and/or have interests in Mexican businesses principally involved

in the transport of goods over the highway in Mexico. Plaintiffs have submitted or have sought to submit applications with the United States Department of Transportation for operating permits that would have allowed them to operate their trucks within the four border states of the United States, i.e., California, Arizona, New Mexico and Texas, since December 18, 1995, and that would have allowed them to operate their trucks within the entire United States since January 1, 2000, and which was negotiated and adopted by the signatories to the North American Free Trade Agreement (NAFTA). Plaintiffs have also sought to submit and have submitted applications with the United States Department of Transportation for the opportunity to invest in, own or control United States-domiciled trucking firms after December 18, 1995, which was negotiated and adopted by the signatories to NAFTA. Plaintiffs bring this action to address the ongoing and continuous patterns, practices and procedures of unlawful discrimination on account of Mexican national origin between December 18, 1995, and the present date in the following areas: by Federal Regulation requiring Mexican nationals to identify their national origin on applications for operating permits to provide cross-boundary trucking services from December 18, 1995 to present, and used the basis of national origin to deny or not process the applications; by Federal Regulation requiring Mexican nationals to identify their national origin on applications for operating permits to provide cross-border and interstate trucking services from January 1, 2000, to present, and used the basis of national origin to deny or not process the applications; and, by Federal Regulation requiring Mexican nationals to identify their national origin on applications for investment in, ownership of or control of United States-domiciled trucking firms from December 18, 1995, to

present; and used the basis of national origin to deny or not process the applications; by failing to properly consider any such applications; and, by failing to approve any such applications. All plaintiffs are suffering continuing harm and damages day-to-day up to the present time as defendants maintain the same unlawful practices on an ongoing basis. Plaintiffs, CARLOS BERRIOCHOA, et al, are Mexican Citizens and residents of Mexico. Plaintiff CARLOS BERRIOCHOA is also a United States Citizen.

III. SUMMARY OF ARGUMENT

The Complaint asserts that Plaintiffs were Mexican citizens who were given the right by NAFTA to have applications for overland trucking transportation permits processed by Defendants on the same basis as U.S. Citizens (and in PLAINTIFF CARLOS BERRIOCHOA's case as a dual citizen) and were denied equal protection of the law and substantive due process when their applications were unilaterally not processed because of their national origin.

This lawsuit is really a dispute over a denial of equal protection and substantive due process where Mexican citizens were given the same rights as United States citizens under the law to apply for operating permits to operate in the United States. Defendants cannot first contend that NAFTA is the supreme law and does not provide for a private right of action and then later contradict themselves by arguing that executive branch officials may ignore NAFTA and deny equal protection of the law by not processing Mexican citizen's applications, especially when NAFTA itself provides for such operating permits to be processed.

This lawsuit is not seeking, nor does it require, a finding by this or any Court that NAFTA provides a private right of action for these Plaintiffs. Plaintiffs are not, by this cause of action, asking this Court to implement NAFTA. The issue here is whether Plaintiffs have a cause of action under the U.S. Constitution, Civil Rights statutes and under a Bivens theory to seek redress for denial of equal protection and for the discriminatory taking of property interests without due process of law. Clearly established law prohibits denying equal protection of the law based on National origin and there was no qualified immunity for Defendants' actions.

Defendants continued the policy of refusing to process the applications of Mexican citizens for U.S. operating permits based solely upon their alienage/national origin and ethnicity. The right to have their applications processed was given to them under NAFTA. Defendants fail to mention that the Executive Branch Officials continued to allow Mexican truckers to traverse the commercial zones of four border states. This tends to prove that the Executive Branch Official's "Safety" justification for its continued refusal to process Mexican citizens' applications was a pretext for discrimination based on National origin. As Defendants admit in their Motion to Dismiss, an Arbitral panel decided that the U.S. was in violation of the most favored nation treatment of NAFTA when U.S. laws and regulations denied operating authority in the United States to existing carriers if the applicant was a Mexican National.

The very idea that Defendants would ask the applicant for the operating permit, whether he was a Mexican National [note that they do not ask if the applicant is of some other nationality] and would then place anyone who

answers that they are a Mexican National in the "do not process" pile is an obvious violation of equal protection where NAFTA specifically gave Mexican citizens the right to apply for those very permits to operate within the United States.

The Court should be mindful of the fact that this alienage/national origin discrimination took place within the United States, not in some foreign country. The United States, through a process of negotiation agreed to give Mexican citizens the same right as United States' citizens to apply for operating permits in the United States. [A denial of equal protection based upon national origin is actionable under *Bivens,* even if the federal statute does not provide for a private right of action.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUILLERMO BERRIOCHOA LOPEZ, et al,	)	
Plaintiffs,	)	NOTICE OF APPEAL
v.	)	Civil Action No. 02-2489 (EGS)
UNITED STATES OF AMERICA, et al,	)	
Defendants	)	

NOTICE IS HEREBY GIVEN that all Plaintiffs in the above-captioned case, GUILLERMO BERRIOCHOA LÓPEZ; TRANSPORTES INTERMEX, S.A. de C.V.; S'ANTONIO TRANSPORTES, S.A. de C.V.; JOSÉ SILVINO MAGAÑA LÓPEZ; JOSÉ ALFREDO MAGAÑA LÓPEZ; MIGUEL ÁNGEL DE LA ROSA SANCHEZ; SERVICIO TÉCNICO AUTOMOTRIZ PERISUR, S.A. de C.V.; TOMAS DE LA ROSA PARRA; ERNESTO VALLET HACES; MAX E. BARTON; CARLOS BERRIOCHOA, Plaintiffs, individually, and on behalf of all others similarly situated, each one of them and all of them, in the above named case, hereby appeal to the United States Court of Appeal for the District of Columbia Circuit from the order granting defendants' Motion to Dismiss and removing the case from the civil active list and from the Memorandum Opinion accompanying the order, both of which were entered on March 23, 2004 which Order and Memorandum Opinion was in favor of Defendants WILLIAM J. CLINTON; FEDERICO F. PEÑA; RODNEY E. SLATER; KENNETH R. WYKLE; RICARDO MARTINEZ, MD; UNITED STATES OF AMERICA; UNITED STATES

DEPARTMENT OF TRANSPORTATION; FEDERAL HIGHWAY ADMINISTRATION; NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION; FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION, and all Defendants named in the action.

Plaintiffs, individually and each of them and all of them, and all those similarly situated, appeal from the Order Granting the Motion to Dismiss entered in this action on the 23rd day of March 2004, and from the entirety thereof. A copy of the Order and Memorandum Opinion appealed from is attached hereto.

Dated: April 21, 2004

PAULSON & NACE

/s/ Barry J. Nace

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Dated: April 21, 2004

LAW OFFICES OF FEDERICO CASTELAN SAYRE

/s/ Kent M. Henderson

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* * *

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
(C. A. No. 02-2489)

GUILLERMO BERRIOCHOA LOPEZ, *et al*, Appellants,

v.

WILLIAM J. CLINTON, *et al*. Appellees.

Statement of Issues to be Raised on Appeal

Pursuant to this honorable Court of Appeal's Order dated April 26, 2004, Appellants hereby respectfully submit the following issues to be raised on Appeal in this matter:

(1) Whether the District Court erred in not allowing Appellants to proceed under a *Bivens* remedy, where Appellants contended that they were denied transportation permits solely based on being Mexican nationals when N.A.F.T.A. allowed for the granting of permits;

(2) Whether the District Court erred in denying Appellants the right to proceed with their litigation under the Federal Tort Claims Act and the Alien Tort Claims Act, where Appellants contended that they were denied transportation permits solely based on being Mexican nationals when N.A.F.T.A. allowed for the granting of permits;

(3) Whether the District Court erred in granting Appellees' Motion to Dismiss, where Plaintiff GUILLERMO BERRIOCHOA LOPEZ is a United States Citizen, as well as a Citizen of Mexico, who was denied a

transportation permit solely on basis of his Mexican nationality;

(4) Whether the District Court erred in not allowing Appellants to proceed by finding that 19 U.S.C. § 3312(c)(2) completely barred Appellants' Claims for Relief.

(5) Appellants hereby respectfully reserve the right to raise any other arguments raised within Appellants' lengthy opposition to Appellees' Motion to Dismiss.

Respectfully submitted this ___ day of May, 2004.

By: _____
BARRY J. NACE, ESQ.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 04-5155
(C. A. No. 02-2489)

GUILLERMO BERRIOCHOA LOPEZ, *et al.* Appellants,

v.

WILLIAM J. CLINTON, *et al.* Appellees.

APPELEES' MOTION FOR SUMMARY AFFIRMANCE

Appellees respectfully move for summary affirmance of the Honorable Emmet G. Sullivan's March 23, 2004 Memorandum Opinion ("Mem. Op.") and Order granting appellees' Motion to Dismiss (copy attached). The "merits of this appeal are so clear as to make summary affirmance proper," *see, e.g., Walker v. Washington*, 627 F.2d 541, 545 (D.C. Cir.), *cert. denied*, 449 U.S. 994 (1980); *accord Ambach v. Bell*, 686 F.2d 974, 979 (D.C. Cir. 1982), and "no benefit will be gained from farther briefing and argument of the issues presented." *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297-298 (D.C. Cir. 1987).

Factual Background

Appellants are Mexican citizens and residents of Mexico who own, operate and/or have interests in Mexican businesses principally involved in the transport of goods over the highway in Mexico. Complaint ("Comp.") at ¶ 1. They claim to have submitted or have sought to submit applications with the United States Department of Transportation ("DOT") for operating permits that would have allowed them to operate their trucks within the four border states of the United States (California, Arizona,

New Mexico and Texas) since December 18, 1995, and that would have allowed them to operate their trucks within the entire United States since January 1, 2000. *Id.*

* * *

Procedural History

Appellants filed their federal Complaint on December 18, 2002. They claim that their action arises under the Equal Protection and Due Process Clauses of the United States Constitution; the Federal Tort Claims Act, 28 U.S.C. § 1346(b); the Alien Tort Claims Act, 28 U.S.C. § 1350, and NAFTA. *See* Comp. at ¶ 6(a)-(e). As the District Court noted, the Complaint is essentially predicated on three allegations arising out of alleged non-compliance with NAFTA: first, that appellees have refused to process and/or approve appellants' applications for permits to operate within the four border states of California, Arizona, New Mexico and Texas since December 18, 1995; 2) appellees have refused to process and/or approve appellants' applications for permits to operate within the entire United States since January 1, 2000; and 3) that appellees have refused to process appellants' applications to invest in, own, or control United States-domiciled trucking firms since December 18, 1995. *See* Mem. Op. at 9-10 (summarizing Complaint) As relief, appellants seek both compensatory and punitive damages in an unspecified amount. *See id.*, Prayer for Relief.

Appellees filed a Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) in July 2003. Briefing on the Motion was completed in November 2003. Appellees' motion was granted by Order of March 23, 2004, and the case was dismissed for lack of jurisdiction over the subject matter. This appeal followed.

Argument

In approving NAFTA, Congress expressly addressed the Agreement's effect on domestic law in the United States. "With respect to private remedies . . . [n]o person other than the United States shall have *any cause of action* or defense under the Agreement or by virtue of Congressional approval thereof." 19 U.S.C. § 3312(c)(1)(A) (emphasis added). In addition:

> No person other than the United States may challenge, in an action brought *under any provision of law*, any action or inaction by any department, agency or other instrumentality of the United States . . . on the ground that such action or inaction is inconsistent with the Agreement [NAFTA].

19 U.S.C. § 3312(c)(2) (emphasis added). Congress recognized that private suits "may interfere with the Administration's conduct of trade and foreign relations and with suitable resolution of disputes under the Agreement." NAFTA Implementation Act, 1993 WL 561124, at *9. With certain narrow exceptions inapplicable here (e.g. the right to challenge certain provisions of the implementing bill under the Tariff Act), Congress broadly described the section 3312 bar as a "prohibition of a private right of action based on NAFTA." *Id.* In short, "a private party" cannot sue "[t]he United States, a state *or* a private party *on the grounds of consistency (or inconsistency) with the NAFTA.*" *Id.* (emphasis added).

Appellants' complaint is predicated *exclusively* upon claims that appellees have acted in a manner inconsistent with NAFTA. As the District Court held, "because all of plaintiffs' claims stem from NAFTA violations, 19 U.S.C. § 3312(c) bars the instant suit." Mem. Op. at 11. This

statutory prohibition in the NAFTA legislation is "explicit," and therefore the "'judicial inquiry is complete" *Id.* (citing, *inter alia, Desert Palace v. Costa,* 539 U.S. 90, 98; 123 S. Ct. 2148, 2153 (2003)). The District Court compared the language barring private claims arising out of NAFTA violations with Congressional language that this Court considered in *National Coalition to Save Our Mall v. Norton*, 269 F.3d 1092, 1095 (D.C. Cir. 2001), and concluded that "the language precluding private party from challenging NAFTA is, if possible, an ever clearer expression of Congressional intent than in *Norton*." Mem. Op. at 12-13.

Further, the proscription against private claims not only precludes claims brought "under" NAFTA, but also claims brought under "*any provision of law.*" *See* 19 U.S.C. § 3312(c)(2); *see also* 19 U.S.C. 3312(c)(1)(A). Therefore, the fact that appellants have pleaded claims under *Bivens*, the Federal Tort Claims Act, and the Alien Tort Claims Act is of no assistance. The words "any provision of law" cannot be read out of the statute. *See Oi-Zhuo v. Meissner*, 70 F.3d 136, 139 (D.C. Cir. 1995) (reaffirming "endlessly reiterated principle of statutory construction . . . that all words in a statute are to be assigned meaning, and that nothing therein is to be construed as surplusage"). The inclusion of this phrase precludes a party from doing exactly what appellants seek to do through their lawsuit – using creative pleading to avoid a plain Congressional mandate against private causes of action.

Other courts that have examined the NAFTA implementation legislation have similarly concluded that private claims are barred. *See LeClerc v. Webb*, 270 F. Supp.2d 779, 804 (E.D. La. 2003); *Friedman v. United States*, 2003 WL 1460525 at **11 (S.D.N.Y. March 18, 2003) ("the NAFTA

Implementation Act, 19 U.S.C. §§ 3301-3473, does not allow for a private right of action against any department or agency of the United States."). Conversely, in their forty-five page opposition to appellees' Motion to Dismiss, appellants failed to cite a single case in which a private party was permitted to maintain a claim for damages or other relief alleging non-compliance with NAFTA by the United States, its agencies or its employees. *See* Mem. Op. at 15 (observing that appellants "dedicate a scant two paragraphs to [appellees'] powerful statutory argument"). The fact is that 19 U.S.C. § 3312(c)(2) and 19 U.S.C. § 3312(c)(1)(A) plainly and definitively preclude appellants' claim for damages arising out of alleged violations of NAFTA. Indeed, "it is hard to see how Congress could make it clearer than it has here." *National Coalition to Save Our Mall*, 269 F.3d at 1094.[1]

---

[1] In the Motion to Dismiss, appellees also argued that each of appellants' claims were subject to dismissal separate and apart from the clear Congressional proscription against private claims arising out of alleged non-compliance with NAFTA. The FTCA claims may be dismissed because 1) they were not presented to the agency within two years of the accrual of the cause of action, nor was the federal court complaint filed within six months of the agency's denial of the administrative claim; 2) there is no analogous duty under state law; 3) the claims are barred under the FTCA's exception for intentional torts, the absence of a fiduciary relationship between appellants and appellees, and because there is no FTCA liability for constitutional torts. *See* Motion to Dismiss at 13-25. The Alien Tort Claims Act count is subject to dismissal because the ATCA is a jurisdictional statute, and does not itself waive the government's sovereign immunity. *See* Motion to Dismiss at 23-25. Finally, the *Bivens* claims are barred because Congress has explicitly precluded a cause of action; and because there are "special factors" precluding judicial recognition of a cause of action; and because the individual defendants are entitled to absolute immunity or qualified immunity. *See* Motion to Dismiss at 25-39. As the District Court determined that the unambiguous language of 19 U.S.C. § 3312 controls this matter, it did not need to reach these arguments.

Conclusion

WHEREFORE appellee respectfully requests that the Court grant its Motion for Summary Affirmance.

/s/ Kenneth L. Wainstein
KENNETH L. WAINSTEIN
United States Attorney

/s/ R. Craig Lawrence
R. CRAIG LAWRENCE
Assistant United States Attorney

/s/ Peter D. Blumberg
PETER D. BLUMBERG
Assistant United States Attorney

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
NO: 04-5155
(C.A. NO 02-2489)

GUILLERMO BERRIOCHOA LOPEZ, et al,

Appellants,

v.

WILLIAM J. CLINTON;
UNITED STATES OF AMERICA, et al,

Appellees.

APPELLANTS' RESPONSE AND OPPOSITION TO APPELLEES' MOTION FOR SUMMARY AFFIRMANCE

Appellants respectfully respond to and oppose Appellees' Motion for Summary Affirmance of the March 23, 2004 Memorandum Opinion ("Mem. Op.") and Order Granting Appellees' Motion to Dismiss. As more fully set forth below, the merits of the Appeal are not so clear as to make summary affirmance proper. See Natural Resources Defense Council, Inc., et al. vs. Morton 458 F.2d 827, 832 (D.C. Cir. 1972). Additionally, the issues in the case include at least one issue of first impression such that Summary Affirmance would not be appropriate.

FACTUAL BACKGROUND

Appellees' Motion for Summary Affirmance sets forth some of the most significant facts regarding this matter. However, an additional fact which does not appear to be addressed in Appellees' Motion for Summary Affirmance

nor in the Memorandum Opinion of the District Court is that Appellants Complaint plead that Appellant GUILLERMO BERRIOCHOA LOPEZ was a citizen of the United States and that he was, as set forth in Opposition to the Motion to Dismiss at the District court level " . . . an American citizen with dual citizenship with Mexico, [who] in fact was forced to sell his interest in U.S. – domicile trucking firm June 30, 1999, because the operating permit for that firm was in jeopardy if any Mexican citizen were to have an ownership interest" (See copy of face page and page 12 of Appellants' Opposition to Motion to Dismiss). Appellees' Motion for Summary Affirmance and the Memorandum Opinion appear to be silent about this factual issue and whether Appellant GUILLERMO BERRIOCHOA LOPEZ, an American citizen, has causes of action under *Bivens*, the Federal Tort Claims Act and the Alien Tort Claims Act, where, because he also happen [sic] to be a Mexican citizen, Appellants contend he suffered a deprivation of his rights causing him damages.

PROCEDURAL HISTORY

Appellees' Motion for Summary Affirmance appears to set forth the significant aspects of the procedural history regarding this matter.

ARGUMENT

1. APPELLEES MOTION FOR SUMMARY AFFIRMANCE SHOULD BE DENIED BECAUSE IT DOES NOT MEET THE HEAVY BURDEN OF DEMONSTRATING THAT THE MERITS OF THEIR CLAIM SO CLEARLY WARRANT RELIEF AS TO JUSTIFY EXPEDITIOUS ACTION

This is a case in which there are, as the District Court described in its Memorandum Opinion, " . . . compelling issues, at least one of which is of first impression in this Circuit." (Mem. Op. 15). In *Natural Resources Defense Council, Inc., et al. vs. Morton*, 458 F.2d 827, 832 (D.C. Cir. 1972), the court citing *United States v. Allen*, 408 F.2d 1287, 1288 (D.C. Cir. 1969) wrote that the party moving for a summary disposition has a "heavy burden of demonstrating both that his remedy is proper and that the merits of his claim so clearly warrant relief as to justify expeditious action." While the *Natural Resources Defense Council* case was a case involving a preliminary injunction at the District Court level, the Motion for Summary Disposition [in that case a Motion for Summary Reversal] was denied. *Id* at 838. Furthermore, in *Friends of the Earth vs. United States Atomic Energy Commission*, 485 F.2d 1031, 1035 Fn.1 (D.C. Cir 1973), the court also described such a summary disposition as an extraordinary remedy.

In *Ashe vs. Robinson* 450 F.2d 681, 683 (D.C. Cir. 1971), a Writ of Habeas Corpus was dismissed without an evidentiary hearing at the District Court level and the court wrote that "A party seeking Summary Disposition of an Appeal – by either affirmance or reversal – has the burden of 'demonstrating both that his remedy is proper and that the merits of his claims so clearly warrant relief

as to justify expedited action'" and the court in *Ashe* went on to conclude in that case that neither party had met the standard.

In *Parker vs. Lewis* 670 F.2d 249, 250 (D.C. Cir. 1982) the court addressed an Appellees' Motion for Summary Affirmance or expedition and framed the question as being one as to whether "[t]he District Court's decision is not so totally free from doubt that summary affirmance of the entire judgment appealed from is appropriate under the standard of United States v. Allen, 408 F.2d 1287, 1288 (D.C. Cir. 1969)." It has also been held that to summarily affirm an order of the District Court, the Court of Appeal " . . . must conclude that no benefit will be gained from further briefing and argument of the issues presented." *Taxpayers Watchdog Inc v Stanley*, 819 F.2d 294, 297-298 [citing *Sills v. Bureau of Prisons*, 761 F.2d 792, 793-94 (D.C. Cir. 1985)]. The reviewing court is also obligated to view the record and the inferences to be drawn therefrom in the light most favorable to Appellants. See *United States v. Diebold, Inc*, 369 US 654, 655 (1962).

In the case at hand, the District Court's Memorandum Opinion acknowledges that this case presented " . . . compelling issues at least one of which is of first impression in this Circuit." (Mem. Op. 15). Appellants contend that where this case does involve at least one issue of first impression that summary affirmance is not an appropriate disposition. Additionally, while the manner in which Appellees' Motion for Summary Affirmance has phrased the issue is one which turns on whether there is a private right of action under NAFTA, Appellants contend that the true issue involved is whether Appellants can proceed on claims which arise from a denial of equal protection under *Bivens* [*Bivens v. Six Unknown Fed. Narcotics Agents*, 403

U.S. 388 (1971] and the Federal Tort Claims Act and the Alien Tort Claims Act. Appellants contend those actions may still exist based on the United States Constitution, the Federal Tort Claims Act and the Alien Tort Claims Act allowing Appellants to proceed in spite of the language contained within the NAFTA Implementation Legislation. Stated more simply, Appellants contend that despite the language cited by Appellees in the NAFTA Implementation Legislation, the question is not whether NAFTA afforded Appellants a private right of action but whether the NAFTA Federal Statute that was then contravened by an executive level order, afforded Appellants a claim for Denial of equal protection of the law under *Bivens* or under the Federal Tort Claims Act and the Alien Tort Claims Act. Appellants contend that this question is somewhat complex and should not be disposed of by summary affirmance.

The questions of whether a *Bivens* action exists under this set of facts and whether there also exists a Federal Tort Claim and an Alien Tort Claims are complex issues in which there will be a benefit gained from further briefing and argument of the issues presented. For example, the Supreme Court has recognized a *Bivens* action for violation of the Equal Protection component of the Due Process Clause of the Fifth Amendment *David v. Passman*, 442 US 228 (1979) [Female Congressional staff member had Federal Constitutional right to be free from gender discrimination]. Other courts have held that Equal Protection under the Due Process Clause of Fifth Amendment supports *Bivens* actions alleging age, race and handicap discrimination as well. See for example *Williams v. Meese*, 926 F.2d 994 (10th Cir. 1991). A *Bivens* action may also be based on a violation of the Fifth Amendment when the

plaintiff alleges the existence of a protected property interest and a deprivation of that interest without Due Process of law. See, for example, *Connelly v. Comptroller of Currency*, 876 F.2d 1209 (5th Cir. 1989).

In *Carlson v. Green*, 446 US 14 (1980), " . . . the Court reasoned that legislation may defeat a *Bivens* claim only if Congress provided 'an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective." See *La Campania Ocho, Inc v. United States Forest Service*, 874 F.2d 1242, 1245 (D. New Mexico 1995) quoting *Carlson v. Green*, supra. While later U.S. Supreme Court cases such as *Schweiker v. Chilicky*, 487 US 412 (1988) and *Bush v. Lucas*, 462 US 367 (1983), refrained from considering a remedy's relative inadequacy, the question remains in this case, as more fully set forth below, whether a *Bivens* remedy should exist for Appellants where the NAFTA provided the right to obtain operating permits which right was breached by official action of the executive branch of government, especially in regards to Appellant GUILLERMO BERRIOCHOA LOPEZ, who was a citizen of the United States and had to sell his interest in a U.S. domiciled tracking firm because the operating permit for that firm was in jeopardy if a Mexican citizen were to have an ownership interest. There also exist issues regarding claims under the Federal Tort Claims Act and Alien Tort Claims Act in which there will be a benefit gained from further briefing and argument of the issues presented.

Moreover, Appellants' Opposition to Motion to Dismiss at the District Court level recited that Plaintiff GUILLERMO BERRIOCHOA LOPEZ was *an American citizen*, with dual citizenship from Mexico who, in fact, was forced to sell his interest in a U.S. domiciled trucking firm

in 1999 because the operating permit for that firm was in jeopardy if any Mexican citizen were to have an ownership interest. [See copy of face page of Opposition to Motion to Dismiss and page 12 of Opposition to Motion to Dismiss attached hereto]. The Memorandum Opinion of the District Court appears to be silent regarding this subject; that is, whether at least Appellant GUILLERMO BERRIOCHOA LOPEZ would have a valid cause of action under *Bivens*, the Federal Tort Claims Act and the Alien Tort Claims Act, where he was an American citizen who was denied equal protection of the law solely because of his Mexican national origin. Certainly, the present Appeal, at the very least, presents a case of unconstitutionality when an American citizen such as GUILLERMO BERRIOCHOA LOPEZ is not allowed to continue with his investment interest in a United States domiciled trucking firm, because of an executive level order which prohibits Mexican nationals from owning an interest in a United States domiciled trucking firm especially where the NAFTA allowed for such ownership but for the executive branch taking a position in contravention of the NAFTA.

2. APPELLANT'S CLAIMS ARE NOT BARRED BY THE LANGUAGE OF 19 U.S.C. §3312.

While Appellees contend that 19 U.S.C. §3312 prohibits Appellants from pursing [sic] any claim for relief, the question of whether Appellants have claims for relief under, for example, *Bivens* involves an analysis of whether special factors counsel hesitation in the absence of affirmative action by Congress or a consideration of whether Appellees show that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as

equally effective. See *Carlson v Green*, 446 U.S. 14, 18-19 (1980). Appellants contend that the only legislative "scheme" under the NAFTA appears to have been a procedure allowing sovereign countries like the United States, Mexico and Canada to submit to an arbitration proceeding regarding enforcement of the treaty but which does not appear to provide any redress for the claims of individuals. Even though in later cases, like *Schweiker v. Chilicky*, 487 US. 412 (1988), the Supreme Court did not allow a *Bivens* remedy when Congress had provided what it considered adequate remedial mechanisms for constitutional violations that may occur in the course of administration of Social Security Disability claims there was in that case at least a mechanism for making a claim. [A discussion of *Bivens* and later cases discussing *Bivens*' remedies is contained in *La Campania Ocho v. United States Forest Service*, 874 F. Supp. 1242, 1245-1247 (D. New Mexico 1995)]. Therefore, as set forth below, Summary Affirmance should not be granted because the Court should consider whether in this set of facts which Appellants contend is an issue of first impression, the Court should allow Appellants to proceed with claims based on *Bivens*, the Federal Tort Claims Act and the Alien Tort Claims Act.

While Appellees contend that other courts have examined the NAFTA Implementation Legislation and have concluded that private claims are barred, the cases cited are cases from the District Court level from other Districts and are distinguishable. In *LeClerc vs. Webb*, 270 F.Supp.2d 799, 804 (E.D. La. 2003), a group of non-immigrant aliens residing temporarily in the United States brought an action challenging a Louisiana Supreme Court Rule requiring that every applicant for the Louisiana Bar be a U.S. citizen or resident alien. One of the

plaintiffs in that case, Maureen Affleck, contended that she was in a special category of non-immigrant aliens in that she was a professional certified by a member of the North American Free Trade Agreement. The court in *LeClerc* wrote that " . . . Affleck offers no support for her implicit assertion that NAFTA preempts the Eleventh Amendment or that NAFTA was meant to preempt well-established state authority over licensing of attorneys." *Id* at 804. The court went on to find that Affleck was attempting to invalidate a state law due to its inconsistency with NAFTA and that NAFTA's enabling legislation limited such a challenge to the United States. *Id* at 804. While the *LeClerc* opinion did cite a portion of the provision of NAFTA that Appellees appear to rely upon in their Motion for Summary Affirmance, that portion of the language was not necessary to the *LeClerc* court's decision as the decision focused upon an inability to invalidate state law where such a legal challenge was limited to the United States by the terms of NAFTA. See *LeClerc* at 804-805. Moreover, the portion of NAFTA relied upon most heavily in *LeClerc* about state law is different from the portion of NAFTA cited by the Appellants in the present action and there had been no finding in *LeClerc* that the United States has breached its obligations under NAFTA as has been found in the Arbitral Panel Report of February 6, 2001 regarding the portion of NAFTA which has to do with the granting of operating permits to Mexican Truckers. (Compare page 4 of Appellees' Motion for Summary Affirmance to page 804 of the *LeClerc* opinion).

LeClerc also does not appear to be an opinion where a member of the Executive Branch of the United States Government instituted a decision which was inconsistent with the NAFTA Legislation and where the plaintiff then

contended that such an action was a denial of Equal Protection of the Law and gave rise to claims under the Federal Tort Claims Act and the Alien Tort Claims Act. Indeed, the claims regarding NAFTA in *LeClerc* apparently had to do with a well established area of state governance regarding admittance to a State Bar Association. Moreover, the *LeClerc* opinion is an opinion of a Federal District Court other than the District of Columbia and not of a Federal Circuit Court of Appeal.

The case of *Friedman vs. United States*, 2003 WL 1460525 at 11 (S.D.N.Y. March 18, 2003), cited by Appellees is a case which was brought by a *pro se* plaintiff against fifteen defendants for damages relating to his slip and fall incident and failed business endeavors in Mexico. It is not clear whether *Friedman*, decided in March 2003, was certified for publication in the Federal Reporter. In that case, *Friedman* claimed that the State Department, Commerce Department and others owed him a duty under NAFTA. It does not appear that *Friedman* pointed to any particular provision of the NAFTA Implementation Act that gave him any particular types of rights but, rather, referred to some discretionary Federal Statutes which were apparently meant to increase the ability of American businessmen to compete in international markets and to facilitate exports and imports and the exchange of commodities and services. The *Friedman* case pointed out that these statutes were discretionary. While the *Friedman* case stated that the NAFTA Implementation Act does not allow for a private right of action against any department or agency of the United States, its does not appear that *Friedman* pointed to a particular provision of NAFTA that provided rights to the plaintiff. Friedman's claim was not one in which he could point to NAFTA as having afforded

him a particular right that was then taken away by the actions of an executive branch official depriving him of equal protection of the law, and actions under the Federal Tort Claims Act and Alien Tort Claims Act. Nor in *Friedman*, had there been a decision regarding a particular portion of NAFTA finding that the United States *"blanket refusal to review and consider" Mexican applications for United States operating or investment authority "was and remains a breach of the U.S. obligations"*. . . . [See Appellees' Motion for Summary Affirmance, page 4, *emphasis* added quoting the final report of the NAFTA Arbitral Panel 82 (Feb.6, 2001). Additionally, *Friedman*, like *LeClerc*, is a District Court level case from a District other than the District of Columbia and is not a Federal Circuit Court of Appeal level case.

3. APPELLANTS CONTEND THAT A *BIVENS* REMEDY IS AVAILABLE IN SPITE OF THE LANGUAGE OF 19 U.S.C. §3312

In 1971, the U.S. Supreme Court held a Petitioner was "entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the [Fourth] Amendment" *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* 403 U.S. 388, 397, (1971). In *Bivens*, the Court found that individual agents acting under color of law and in violation of the command of the Fourth Amendment gave rise to a cause of action for damages consequent on the agents' unconstitutional conduct. *Id.* At 389. The premise for the Court's decision was in well settled law, noting "federal courts may use any available remedy to make good the wrong done.' *Bell v. Hood*, 327 U.S. 678, 684, 66 S.Ct. 773, 777 (1946).

To establish a violation of procedural due process in a *Bivens* action, the Plaintiff must prove: (1) the existence of a protected property interest; (2) a deprivation of that interest under color of law; and, (3) a lack of due process. *Connelly*, 876 F.2d at 1211. To show a lack of due process, the Plaintiff must show that the procedures made available were not merely insufficient or even inadequate, but that they were constitutionally inadequate, containing a defect so serious that they were fundamentally unfair. See *Mac' Avov v. Smithsonian Institute*, 757 F. Supp. 60 (D.C. 1991); *Whitacre v. Davey*, 890 F.2d 1168 (1989), *cert. denied*, 110 S.Ct. 3301 (1990). Circuit Courts have held that where there is a showing of deprivation of such basic due process rights as reasonable notice of a claim and a meaningful opportunity to respond, there is a violation of due process. See *Arcoren v. Peters*, 829 F.2d 671 (8th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988).

In addition to the property right conveyed to Appellants by NAFTA, it is necessary to observe that the right to Equal Protection is a separate Constitutional Right to which Appellants are entitled. The Equal Protection Clause indicates that a state may not deny "any person within its jurisdiction the equal protection of the laws," U.S. Constitution, Amendment 14. *Swint v. City of Wadley, Alabama*, 51 F.3d 988, 1000, affirmed the district court's finding that "the equal protection right to be free from intentional racial discrimination was clearly established." This Amendment expressly indicates, that the government is prohibited from treating similarly situated persons differently. *Norton v. Village of Corrales*, 103 F.3d 928, 933 (10th Cir. 1996) quoting *Buckley Constr. Inc., v. Shawnee Civic & Cultural Develop. Auth.* 933 F.2d 853, 859 (10th Cir. 1991). "The Fifth Amendment's due process clause,

applicable to the United States, has been construed to implicitly include an equal protection guaranty generally as broad as that of the Fourteenth Amendment." *U.S. v. Gourley*, 168 F.3d 165, 171 (5th Cir.1999). Since the Mexican Truckers were entitled under NAFTA to submit the permit applications for processing in the same manner as American Truckers, they were on equal footing to the latter. Any purposeful actions in which an application was not processed (although Appellees appear to only claim that the applications were not completely processed) based on discrimination due to race, gender, alienage or national origin is unlawful. *Hedges v. Poletis*, 177 F.3d 1071, 1075 (8th Cir. 1999) ("it is unlawful for state officials to discriminatorily enforce the laws against a disfavored class of persons solely on the basis of their membership in that class).

As noted *Infra*, cases such as *Carlson v. Green*, 446 U.S. 14 (1980), *Davis v. Passman*, 442 U.S. 228 (1978), *Bush v. Lucas*, 462 U.S. 367 (1983) and *Schweiker v. Chilicky*, 487 U.S. 412 (1988) have discussed the parameters of the application of a *Bivens* remedy to certain factual situations. Both *Davis vs. Passman*, supra and *Carlson v. Green*, supra appear to be more willing to allow the creation of a *Bivens* remedy whereas *Bush v. Lucas*, supra and *Schweiker v. Chilicky*, supra, are somewhat more restrictive. However, even *Schweiker v. Chilicky*, supra discuss the existence of a mechanism set up by Congress for individuals to dispute the termination of the Social Security Disability benefits at issue in that case even if the system set up by Congress was not adequate. See discussion of these authorities in *La Campania Ocho v. United States Forest Service*, 874 F. Supp 1242, 1245-1248 (D. New Mexico, 1995).

The act in question appears to provide no remedial scheme for Appellants to pursue. Therefore, appellants' constitutional claims cannot in any way be encompassed within the statutory language since there is no statutory remedial scheme set forth therein for them to pursue. Such a conclusion is consistent with the prior authority of this Federal Circuit, as well as the authority set forth by the United States Supreme Court. *See Chung v. United States Dep't of Justice*, 333 F.3d 273, 274 (D.C.Cir.2003); *see* also *Idaho v. Coeur d'Alene Tribe of Idaho* 521 U.S. 261, 295, 117 S.Ct. 2028, 2047 (U.S. (Idaho), 1997). The only mechanism of dispute appears to be by the sovereign countries to the agreement the United States, Canada and Mexico, to take their national state claims to arbitration.

Certainly, Appellant GULLLERMO BERRIOCHOA LOPEZ, an American Citizen, would appear to have rights under *Bivens* similar to the plaintiff in *Davis v. Passman*, 442 U.S. 228 (1978), with the one distinction being that his rights would be based upon national origin rather than gender. The consideration of these questions is such that Appellees' Motion for Summary Affirmance should he denied and the Court should allow further briefing regarding these matters.

4. APPELLANTS CLAIMS REGARDING THE FEDERAL TORT CLAIMS ACT SHOULD NOT BE DECIDED BY SUMMARY AFFIRMANCE

Appellants' claims regarding the Federal Tort Claims Act should not be decided by summary affirmance.

(a) FEDERAL TORT CLAIMS ACT 28 U.S.C. § 1346

The Supreme Court in *Fares v. United States, Jefferson v. United States, United States v. Griggs*, 340 U.S. 135. 71 S.Ct. 143 identified the general framework in which the Federal Tort Claims Act should be analyzed:

> "This Act, however, should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole. The Tort Claims Act was not an isolated and spontaneous flash of Congressional generosity. It marks the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit . . .
>
> At last, in connection with the Reorganization Act, it waived immunity and transferred the burden of examining tort claims to the courts. The primary purpose of the Act was to extend a remedy to those who had been without; if it incidentally benefited those already well provided for, it appears to have been unintentional.

Here, the Appellee the United States voluntarily, through freely negotiated terms with adjoining sovereign nations, entered into NAFTA with their eyes wide open. Once NAFTA was ratified and enacted the Appellee the United States was bound by its terms.

In *Block v. Neal*, 103 S.Ct. 1089 (1983), the Court in holding the government liable for the Farmers Home Administration's negligence in their processing of applications in connection with the construction of plaintiffs home, found in relation to the Federal Tort Claims Act:

> However, the Court of Appeals found that respondent's complaint stated a claim for negligence under

> the principle "that one who undertakes to act, even though gratuitously, is required to act carefully and with the exercise of due care and will be liable for injuries proximately caused by failure to use such care." *Id.. at 1181-1182,* citing *Restatement (Second) of* Torts *§ 323 (1965).* It noted that, subject to express exceptions, the Tort Claims Act, *28 U.S.C. § 2674,* authorizes suit against the Government for the negligence of a federal agency in performing a voluntary undertaking. *Ibid.* [FN2]

In *Appleton v. United States*, 98 F.Supp.2d 30, (2000), the District of Columbia District Court found, in denying Defendant's Motion for Summary Judgment, in connection with the a federal agency and its officers negligence in processing federal applications:

> "The FTCA allows the government to be held liable "in the same manner and to the same extent as a private individual under like circumstances. . . ." 28 U.S.C. § 2674 ("the private-party provision"). In the August 31, 1999 Opinion, this court applied that provision to the facts here and concluded that, as a matter of law, the ATF had a duty to use due care in reviewing Mr. Appleton's import applications and may be held liable if shown to have breached that duty. [FN6] This is the law of the case. [FN7]"
>
> "FN6. The court addressed and expressly rejected the government's argument that the government cannot be held liable under the FTCA for negligence in the performance of a "core government function." *See* Mem.Op. dated August 31, 1999. The court also rejected the government's argument that it could not owe a permit applicant any duty of care because it had no duty to act on a permit application at all. *Id.*"

The Court in that case, viewed with suspicion the circular argument the government put forth:

> "The ATF has never denied that if an application's manufacturer entry contains the name of a debarred entity, the examiner has no choice but to deny the application in compliance with the directive of the State Department. But proof that ATF has no discretion to approve imports it *knows* are made by a debarred entity begs the central question, "Do ATF examiners have discretion not to investigate an application which uses a generic manufacturer term which might represent a debarred entity?" [FN4]"

Here, Appellants contend that Appellees were precluded by law to deny applications by trucking enterprises whose trucks were safe or in compliance with environmental standards. The question here would be, "Do Appellees have discretion not to process an application of a trucking enterprise which *might* be otherwise eligible to drive within the United States?" The Court in *Appleton* ruled that was a disputed material fact precluding the entry of a summary judgment under the Federal Tort Claims Act.

Congress and the President had the discretion to freely negotiate the terms of the agreement they entered into with Canada and Mexico. Once that discretion was used and NAFTA was ratified and implemented, Appellees became liable for their action in not following its mandates, which led to the damages sustained by Appellees.

Additionally, in *Campbell v. District of Columbia*, 580 A.2d 1295, (D.C.C.A., 1990) there was recognized a separate cause of action for the government's breach of its duty to enforce the law.

As the Federal Tort Claims Act is another federal statute separate from 19 U.S.C §3312, allowing Appellants to pursue claims, the Court should not grant Appellees'

Motion for Summary Affirmance and should allow further briefing regarding this issue.

5. APPELLANTS CAN STATE CLAIMS UNDER THE ALIEN TORT CLAIMS ACT 28 U.S.C. §1350[1]

The Court in *Argentine Republic v. Amerada Hess Shipping Corp.*, 109 S.Ct. 683 (1989) described the Alien Tort Claims Act as follows:

> "Enacted by the First Congress in 1789, the Alien Tort Statute provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. §1350."

The Alien Tort Act provides the Court with jurisdiction to decide the claims bought by Appellants against Appellees for violations of NAFTA by the Appellees. The Courts have ruled that the Alien Tort Claims Act is jurisdictional only and does not supply the waiver of sovereign immunity to hold Appellees accountable for their actions.[2] In this

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[1] 28 U.S.C.A § 1350. Alien's action for tort

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States

[2] See [*Rosner v. United States*, 231 F.Supp.2d 1202 (S.D. Fla., 2002)] The ATCA supplies federal courts with jurisdiction over tort claims brought by aliens for violation of international law. 28 U.S.C. § 1350 ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."). The ATCA, however, is a jurisdictional statute only and does nor itself waive sovereign immunity. [FN10] *Goldstar v. United States*, 967 F.2d 965, 968 (4th Cir.1992) ("the Alien Tort Statute has been interpreted as a jurisdictional statute only – it has not been held to imply any waiver of sovereign immunity")

case, Appellees sovereign immunity claims are barred by the remedies otherwise afforded the Appellants by the Equal Protection Clause of the United States Constitution; the Due Process Clause of the Fifth Amendment; the Federal Tort Claims Act, and their Federal Civil Rights under *Bivens*. Thus, an action under the Alien Tort Claims Act does lie.

Appellees cannot contend that the Alien Tort Claims Act grants the Court jurisdiction to hear this matter but precludes it from deciding whether a violation has occurred particularly when Appellants have identified the aforementioned exceptions to Defendants' sovereign immunity claims.

Additionally, the plain language of the Alien Tort Claims Act gives the Court jurisdiction to hear this claim. The United States cannot now claim that other sovereign nations are subject to this statute and they are not. Such a reading would fundamentally turn the law on its head.

(a) APPELLEES DO NOT HAVE SOVEREIGN IMMUNITY DEFENSE AVAILABLE HERE

The Supreme Court has consistently found that should the law provide alternative remedies providing a bar to a defense of sovereign immunity then an action will lie. As the Court in *Carlson v. Green*, 446 U.S. 14 (1980) held:

> In the absence of a contrary expression from Congress, § 2680(h) thus contemplates that victims of the kind of intentional wrongdoing alleged in this complaint shall have an action under FTCA against the United States as well as a *Bivens* action against the individual officials alleged to have infringed their

> constitutional rights. This conclusion is buttressed by the significant fact that Congress follows the practice of explicitly stating when it means to make FTCA an exclusive remedy.

This is also the case when Defendants engage in a violation of Title 42 U.S.C. §1983.

(b) APPELLEES ACTIONS CONSTITUTE A VIOLATION OF THE ALIEN TORT CLAIMS ACT

28 USCA § 1361 grants the Court jurisdiction to compel an officer of the United States to perform his duty:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

The Court's analysis in *Judicial Watch Inc v. National Energy Policy Development Group* 219 F.Supp 2nd 20 interpreting another statutory scheme that did not provide for a specific private of action, yet where plaintiffs' rights were violated, is applicable:

> "Following *Reich*, this Court holds that the mandamus statute may provide an avenue to remedy violations of statutory duties even when the statute that creates the duty does not contain a private cause of action. Accordingly, this Court must now turn to the question of whether FACA creates such a duty.

This Court continues, in *Judicial Watch Inc.*, id., in analyzing the Defendants duties under the statute specified to determine whether a non-discretionary duty was implicated:

"2. Non-Discretionary Duty

When a federal official has an obligation to perform a ministerial or non-discretionary duty, a federal district court may issue a writ of mandamus under §1361 to compel that officer to fulfill the obligation. *National Wildlife Fed'n v. United States*, 626 F.2d 917, 923 (D.C.Cir.1980). However, mandamus is a "drastic remedy, to be invoked only in extraordinary situations." *Consolidated Edison Co. of New York v. Ashcroft*, 286 F.3d 600, 605 (D.C.Cir.2002); *In re Papandreou*, 139 F.3d 247, 249 (D.C.Cir.1998). As the Supreme Court has explained, a "ministerial duty" doubt and equivalent to a positive command. . . . [W]here the duty is not thus plainly prescribed, but depends on a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus." *Wilbur v. United States*, 281 U.S. 206, 218-19, 50 S.Ct. 320, 74 L.Ed. 809 (1930) (quoted in Consolidated *Edison*, 286 F.3d at 605)."

Thus, when a non-discretionary action was involved, the Courts, it was found, had the power to involve itself in righting the wrong. In this case, NAFTA is explicit in specifying the obligations of the parties in relation to the plaintiffs. The Appellees had a ministerial, non-delegable duty to process the applications.

The Appellees could reject the individual applications for reasons consistent with NAFTA, and its own laws, however it could not arbitrarily refuse to process *any* applications based on simply the alienage of the parties applying, after NAFTA allowed those very same individuals to submit their applications. Similarly, a decision whether to admit a patient to a hospital is generally

protected by the discretionary function exception, however, once a patient has been admitted, the governments duty in treating the patient is nevertheless non-discretionary, *Jackson v. Kelly*, 557 F. 2d 735 (10th Cir. 1977).

Here, once NAFTA was ratified and implemented, the government's duties and obligations in implementing the agreement, in this case by processing the Appellants' applications, became non-discretionary.

The Supreme Court of the United States in *Bernal v. Fainter*, 104 S.Ct. 2312 (1984) found in a case overturning a state law that denied foreign residents from becoming notaries:

> "As a general matter, a state law that discriminates on the basis of alienage can be sustained only if it can withstand strict judicial scrutiny. [FN5] In order to withstand strict scrutiny, the law must advance a compelling state interest by the least restrictive means available
>
> FN5. "[C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority . . . for whom such heightened judicial solicitude is appropriate." Graham v. Richardson, 403 U.S. 365, 372, 91 S.Ct. 1848, 1852, 29 L.Ed.2d 534 (1971) (footnotes and citations omitted)."
>
> FN6. Only rarely are statutes sustained in the face of strict scrutiny. As one commentator observed, strict-scrutiny review is "strict" in theory but usually "fatal" in fact. Gunther, The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model

for a Newer Equal Protection, 86 Harv.L.Rev. 1, 8 (1972).

Here, the Appellees, in light of a NAFTA, federal laws prohibiting discrimination, an arbitral panels finding that Mexicans be allowed to travel in the United States, the Appellees specifically targeted Mexican [sic] as not being able to come further into the country, and thus the United States is liable for its breach under the Alien Tort Claims Act.

Because the application of the facts to the existing authorities and statutes in this matter are complex, the merits of the Appeal are not so clear as to make summary affirmance proper and Appellees' Motion of Summary Affirmance should be denied

CONCLUSION

For the foregoing reasons, the Court should deny Appellees' Motion for Summary Affirmance.

DATED this 15th day of July, 2004

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